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Supreme Court, U.S.
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JOSEPH F. SPANUZZI, JR.
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Supreme Court of The United States
October Term, 1988

City of Garfield Heights
Petitioner

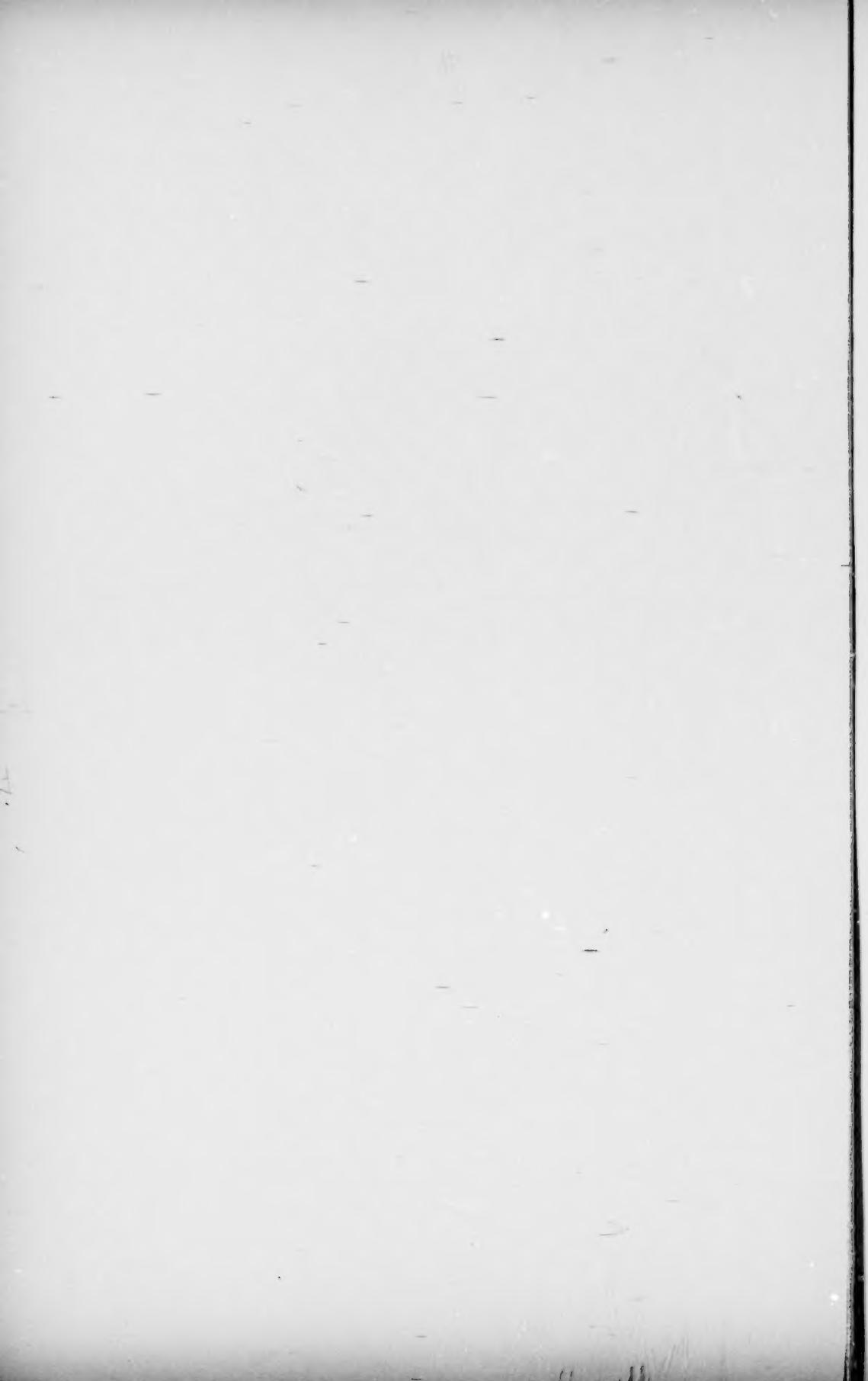
v.

William Asad
Respondent

Petition For Writ of Certiorari
From The Supreme Court of Ohio

David E. Mack
Wilhelm G. Spiegelberg
City of Garfield Heights
5555 Turney Road
Garfield Heights, Ohio 44125
(216) 475-1100
Attorneys for Petitioner

29 JUN



Questions Presented

I.

Did the Supreme Court of the State of Ohio violate Petitioner's Fourteenth Amendment due process rights in denying review of the Eighth District Court of Appeals decision which determined Respondent could prevail over Petitioner on the basis that Petitioner failed to give Respondent proper notice of its appeal of an Ohio Civil Rights Commission Ruling?

II.

Did the Supreme Court of the State of Ohio violate Petitioner's Fourteenth Amendment due process rights as affirmed in the Ohio Constitution by requesting that Petitioner be hired for the next available fire fighting position in the face of a medical history which would not be acceptable under normal circumstances?

Parties To The Proceedings Below

**In each of the Courts below, Plaintiff was
the City of Garfield Heights and Defendant was
William Asad.**

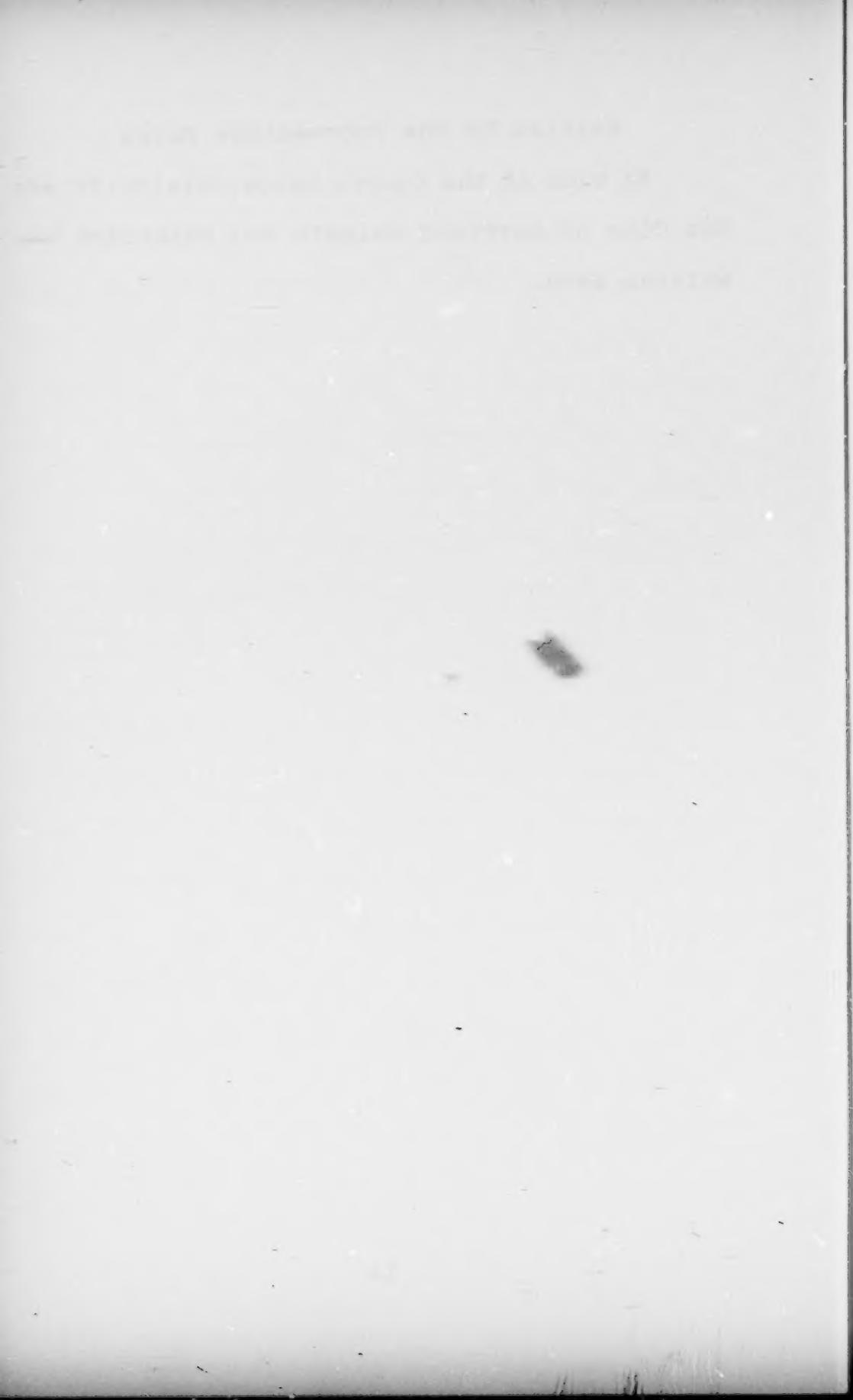
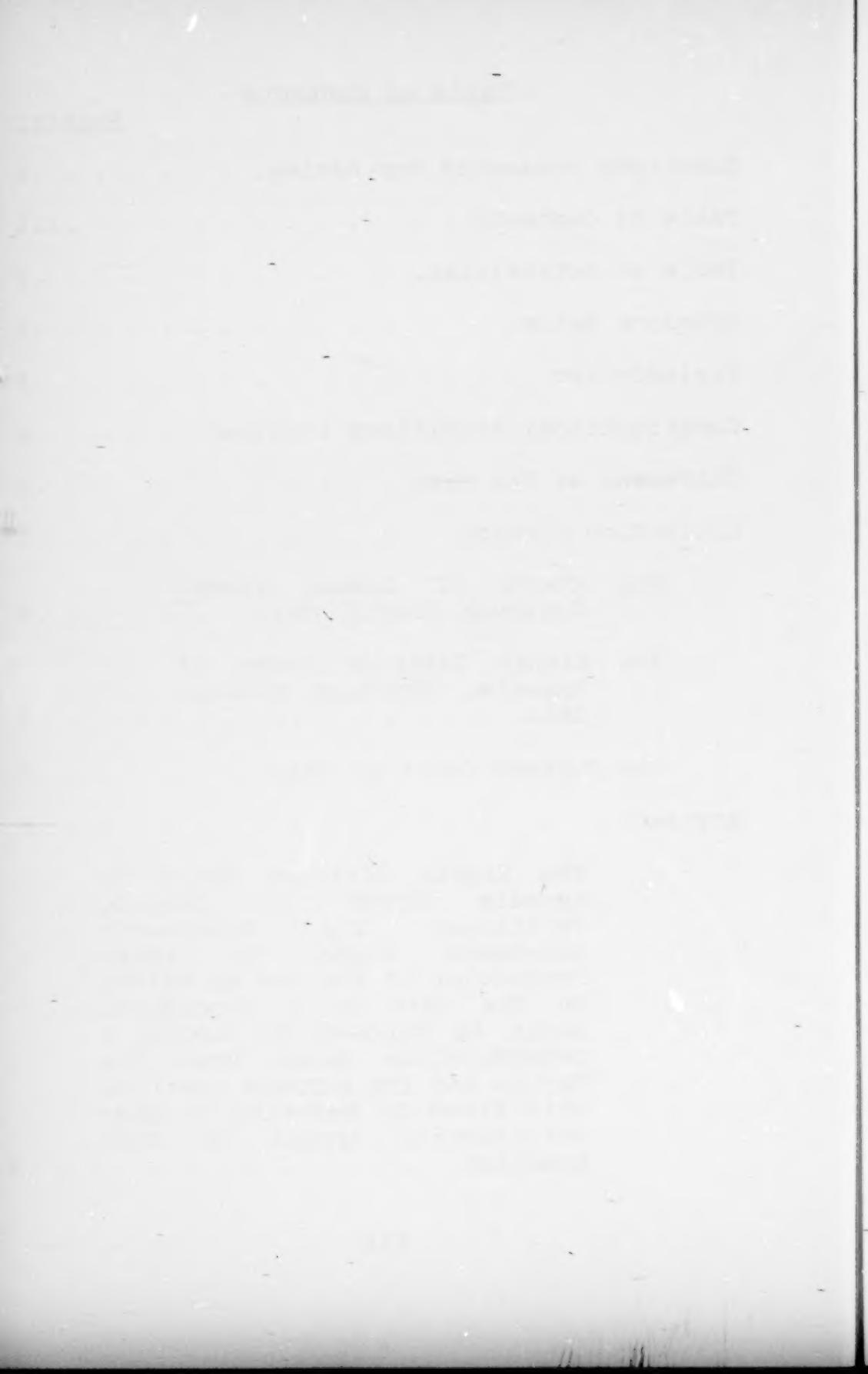


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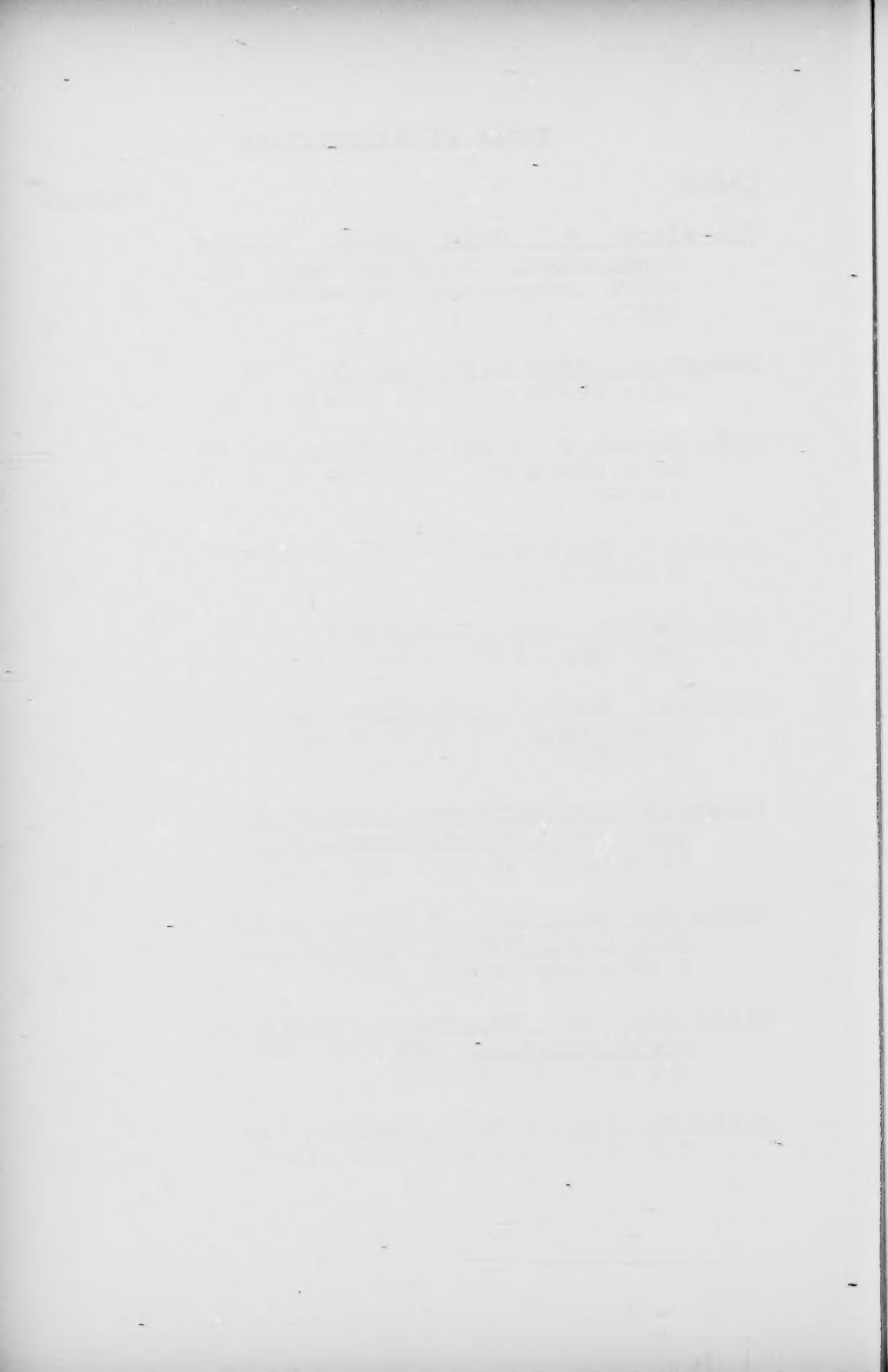


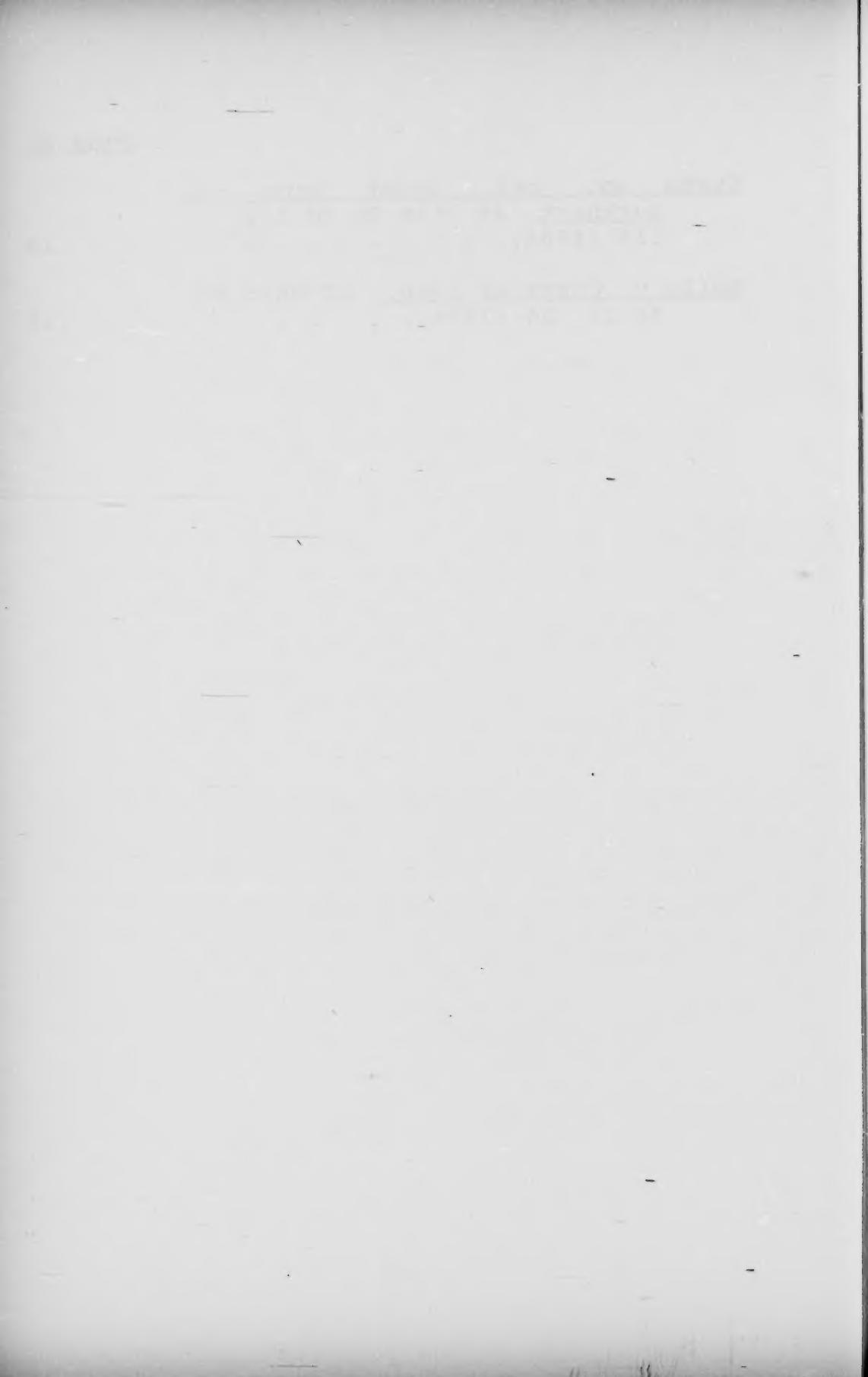
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Opinions Below

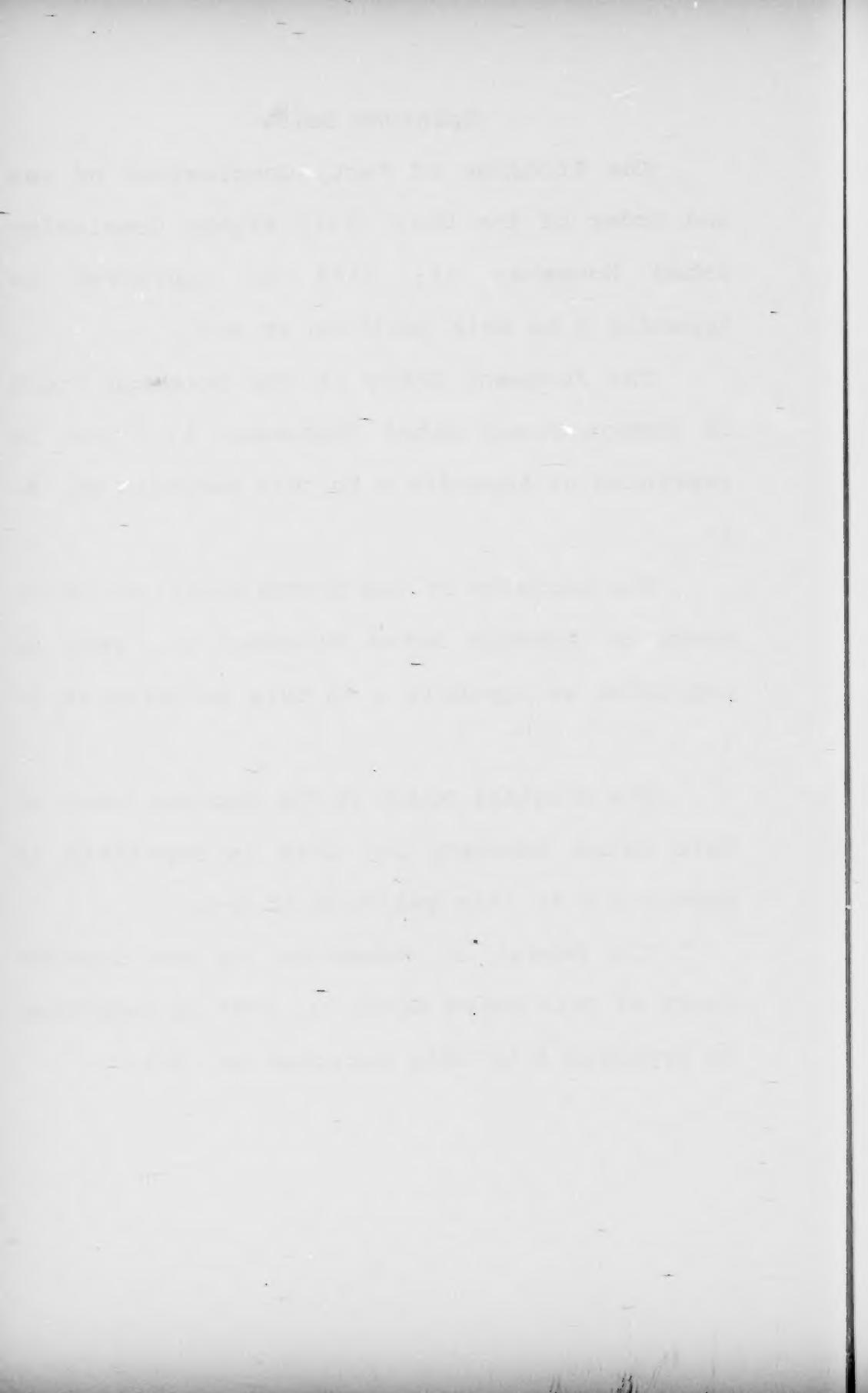
The Findings of Fact, Conclusions of Law and Order of the Ohio Civil Rights Commission dated November 14, 1985 is reprinted as Appendix A to this petition at A-1.

The Judgment Entry of the Cuyahoga Court of Common Pleas dated September 17, 1987 is reprinted as Appendix B to this petition at B-1.

The Decision of the Eighth District (Ohio) Court of Appeals dated November 10, 1988 is reprinted as Appendix C to this petition at C-1.

The Original Order of The Supreme Court of Ohio dated February 15, 1989 is reprinted as Appendix D to this petition at D-1.

The Denial of Rehearing by the Supreme Court of Ohio dated March 22, 1989 is reprinted as Appendix E to this petition at E-1.



Jurisdiction

The Denial of Rehearing by the Supreme Court of Ohio was entered on March 22, 1989. This petition for certiorari is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(i).

Constitutional Provisions Involved

Fourteenth Amendment, Section 1, United States Constitution:

"Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement Of The Case

William R. Asad submitted an application for a position as a fire fighter to the City of Garfield Heights on February 19, 1982. Mr. Asad scored high enough on his Civil Service

Test to qualify for an interview for certain available positions.

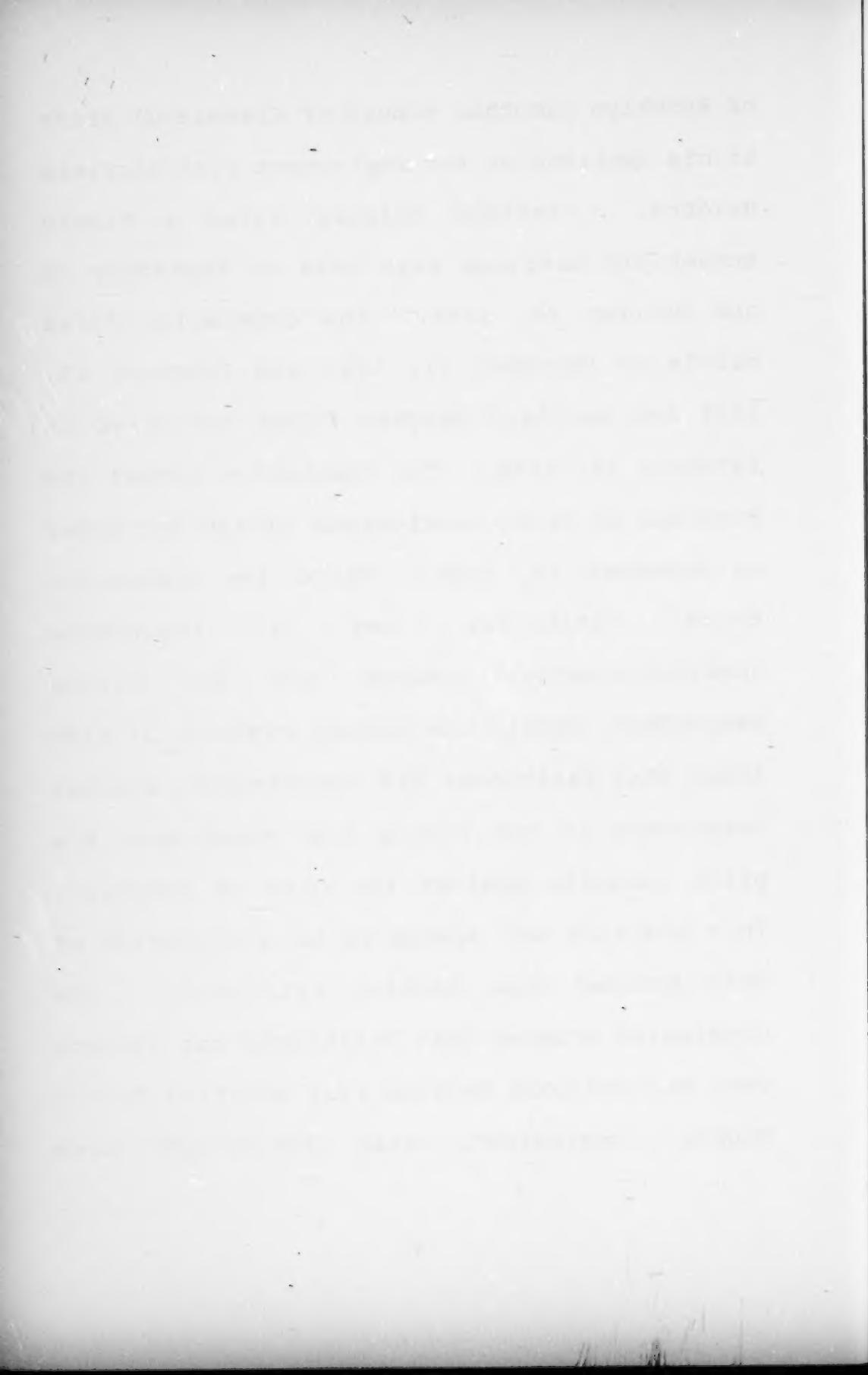
Mr. Asad also took two (2) physical examinations which he neither passed nor failed. He was not certified by the doctor to do "heavy" work.

He was then interviewed by the then Mayor, Safety Director and Fire Chief of Garfield Heights, who then, upon review, determined that Mr. Asad was not the best candidate available. This determination was based primarily on Mr. Asad's medical record, particularly the fact that Mr. Asad was the only candidate at the time not to be certified for "heavy" work.

Litigation History

Mr. Asad filed a complaint with the Civil Rights Commission of the State of Ohio on May 24, 1983, claiming Garfield Heights refused to hire him as retaliation for his filing an unlawful discrimination suit against the City

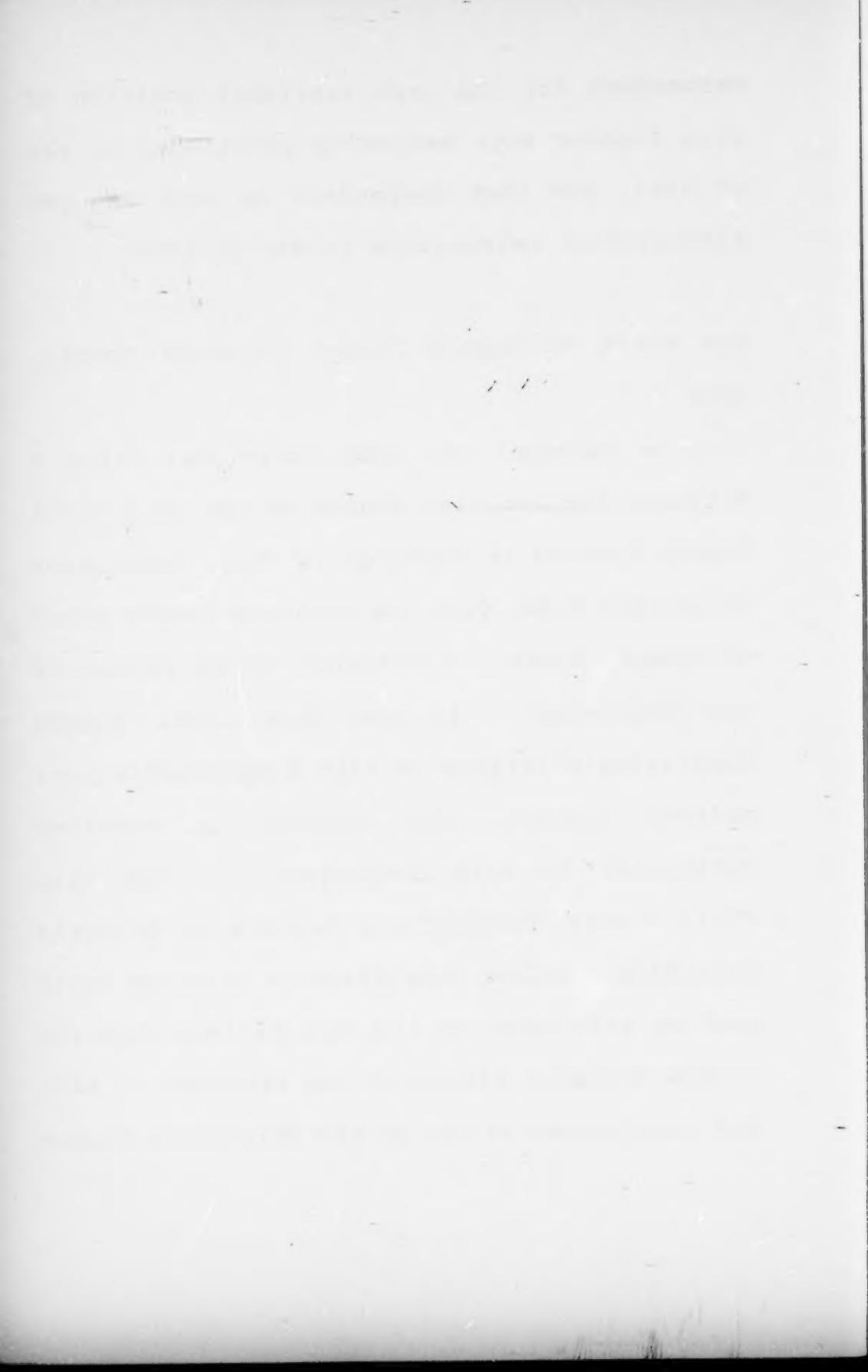
of Brooklyn (another suburb of Cleveland) prior to his application for employment with Garfield Heights. Garfield Heights filed a timely answer and hearings were held on September 25 and October 26, 1984. The Commission filed briefs on December 31, 1984 and February 13, 1985 and Garfield Heights filed its brief on February 13, 1985. The Commission issued its Findings of Fact, Conclusions of Law and Order on November 14, 1985. While the Commission found Petitioner had a legitimate nondiscriminatory reason for not hiring Respondent, namely his medical history, it also found that Petitioner did discriminate against Respondent in not hiring him based upon his prior lawsuits against the City of Brooklyn. This practice was deemed to be a violation of Ohio Revised Code Section 4112.05(G). The Commission ordered that Petitioner not violate Ohio Revised Code Section 4112 entitled "Civil Rights Commission", that Petitioner hire



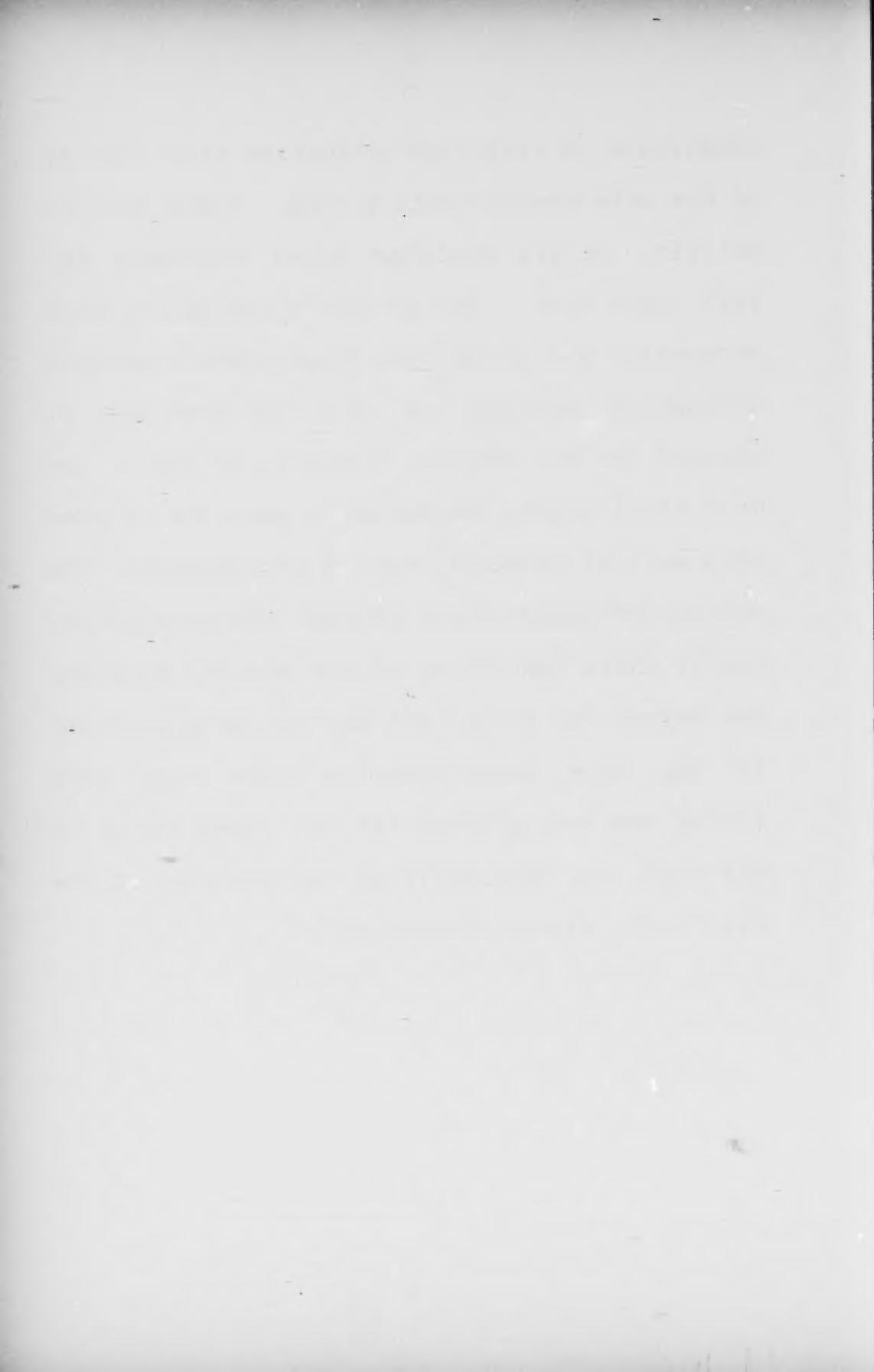
Respondent for the next available position of fire fighter with seniority privileges to May of 1983, and that Respondent be paid any pay differential retroactive to May of 1983.

The Court of Common Pleas, Cuyahoga County, Ohio

On December 24, 1985 Petitioner filed a Petition For Judicial Review of the Ohio Civil Rights Commission Findings of Fact, Conclusion of Law and Order with the Cuyahoga County Court of Common Pleas. Petitioner asked review of the following: 1) the Ohio Civil Rights Commission's failure to take Respondent's poor medical history into account in ordering Petitioner to hire Respondent, 2) the Ohio Civil Rights Commission's failure to properly investigate and/or conciliate as required under Section 4112.05(B) of the Ohio Revised Code and 3) the untimely filing of the Findings of Fact and Conclusions of Law by the Ohio Civil Rights

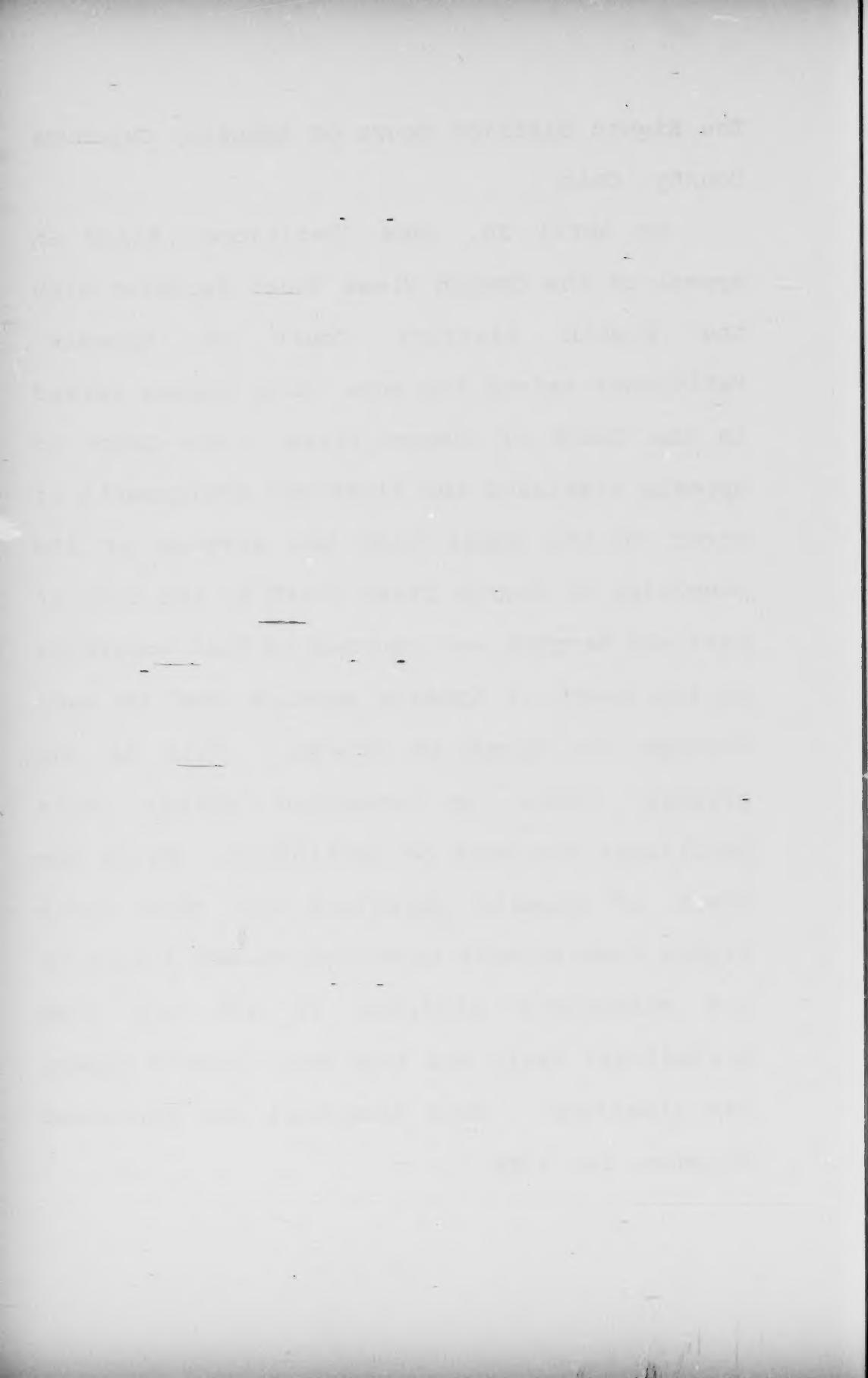


Commission in violation of Section 4112-3-09(A) of the Ohio Administrative Code. Judge Burt W. Griffin, in his decision dated September 16, 1987, held that 1) Petitioner's refusal to hire Respondent was based upon Respondent's pending litigation against the City of Brooklyn as opposed to his medical history, 2) while the Ohio Civil Rights Commission's position on pre-hire medical examinations was inconsistent, its mediation/conciliation attempt was acceptable, and 3) while the filing of the hearing examiner was beyond the sixty (60) day period prescribed in the Ohio Administrative Code said late filing was not prejudicial to either party in the case, and thus affirmed the decision of the Ohio Civil Rights Commission.



The Eighth District Court of Appeals, Cuyahoga County, Ohio

On April 20, 1988, Petitioner filed an appeal of the Common Pleas Court decision with the Eighth District Court of Appeals. Petitioner raised the same three issues raised in the Court of Common Pleas. The Court of Appeals dismissed the first two assignments of error on the basis that the service of its complaint in Common Pleas Court by the City of Garfield Heights was improper in that according to the Court of Appeals service need be made through the Clerk of Courts. This is the primary issue in question within this Petitioner for Writ of Certiorari. While the Court of Appeals chastised the Ohio Civil Rights Commission's tardiness on the filing of its examiner's findings it did not find prejudicial fault and thus Petitioner's appeal was dismissed. Said dismissal was announced November 10, 1988.



The Supreme Court of Ohio.

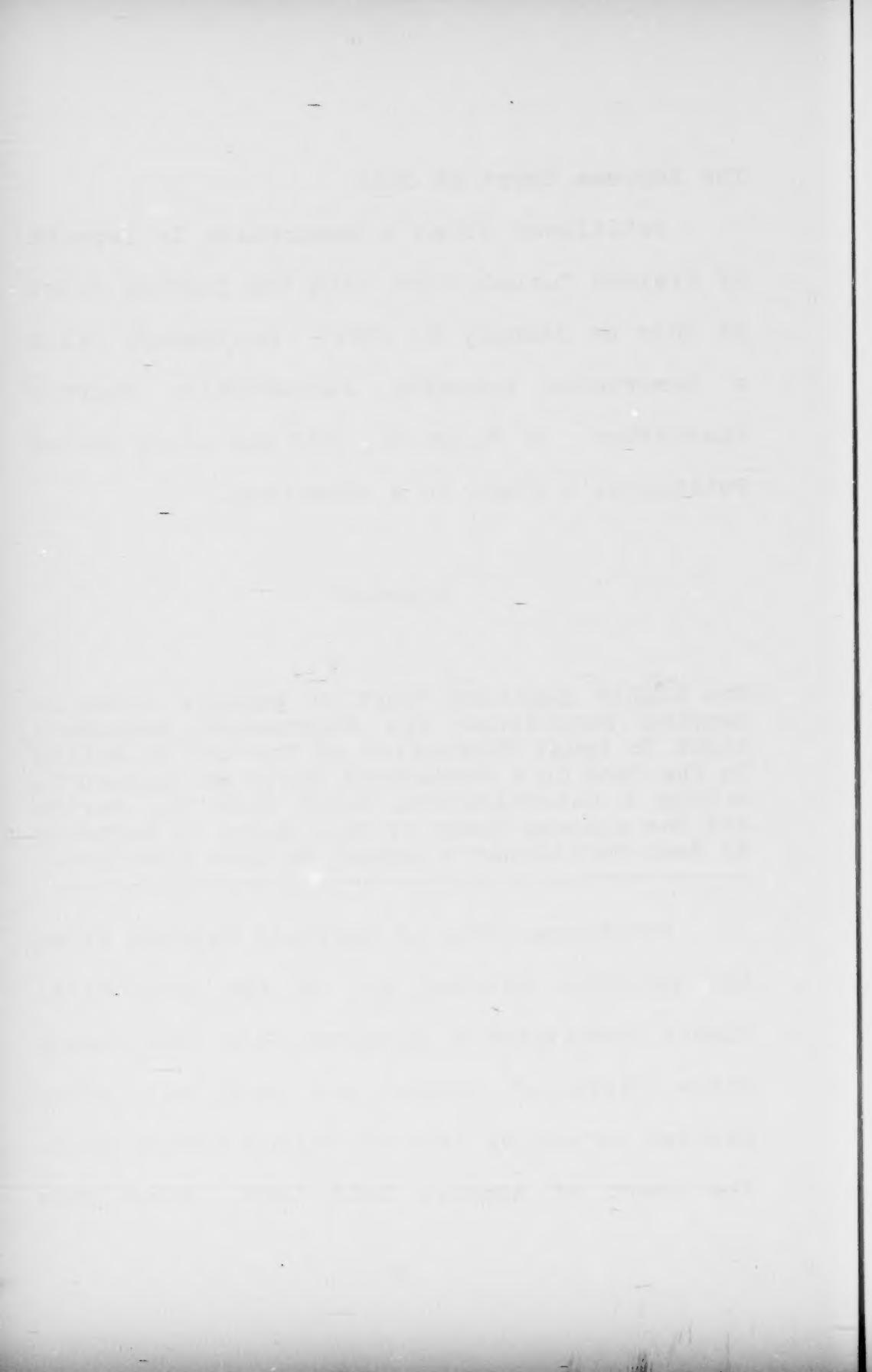
Petitioner filed a Memorandum In Support Of Claimed Jurisdiction with the Supreme Court of Ohio on January 6, 1989. Respondent filed a Memorandum Opposing Jurisdiction shortly thereafter. On March 22, 1989 the Court denied Petitioner's right to a rehearing.

Argument

I.

The Eighth District Court Of Appeals Erred In Denying Petitioner Its Fourteenth Amendment Right To Equal Protection Of The Law By Ruling On The Case On A Procedural Basis As Opposed To Making A Determination Based Upon The Merits And The Supreme Court of Ohio Erred In Refusing To Hear Petitioner's Appeal On That Question.

Petitioner City of Garfield Heights filed its petition arising out of the Ohio Civil Rights Commission's findings with the Common Pleas Clerk of Courts and sent all other parties copies by regular United States mail. The Court of Appeals held that, under Ohio



Revised Code Section 4112.06(B), other parties in administrative appeals must be served by summons through the Clerk of Courts. The Eighth District Court of Appeals cited its own earlier decision in Cleveland v. Ohio Civil Rights Commission, (December 24, 1987), Cuyahoga App. No. 53095, unreported. This was its only authority. Petitioner contends that the Court of Appeals incorrectly applied Ohio law in these earlier decisions. Ohio Revised Code Section 4112.06(B) states in pertinent part:

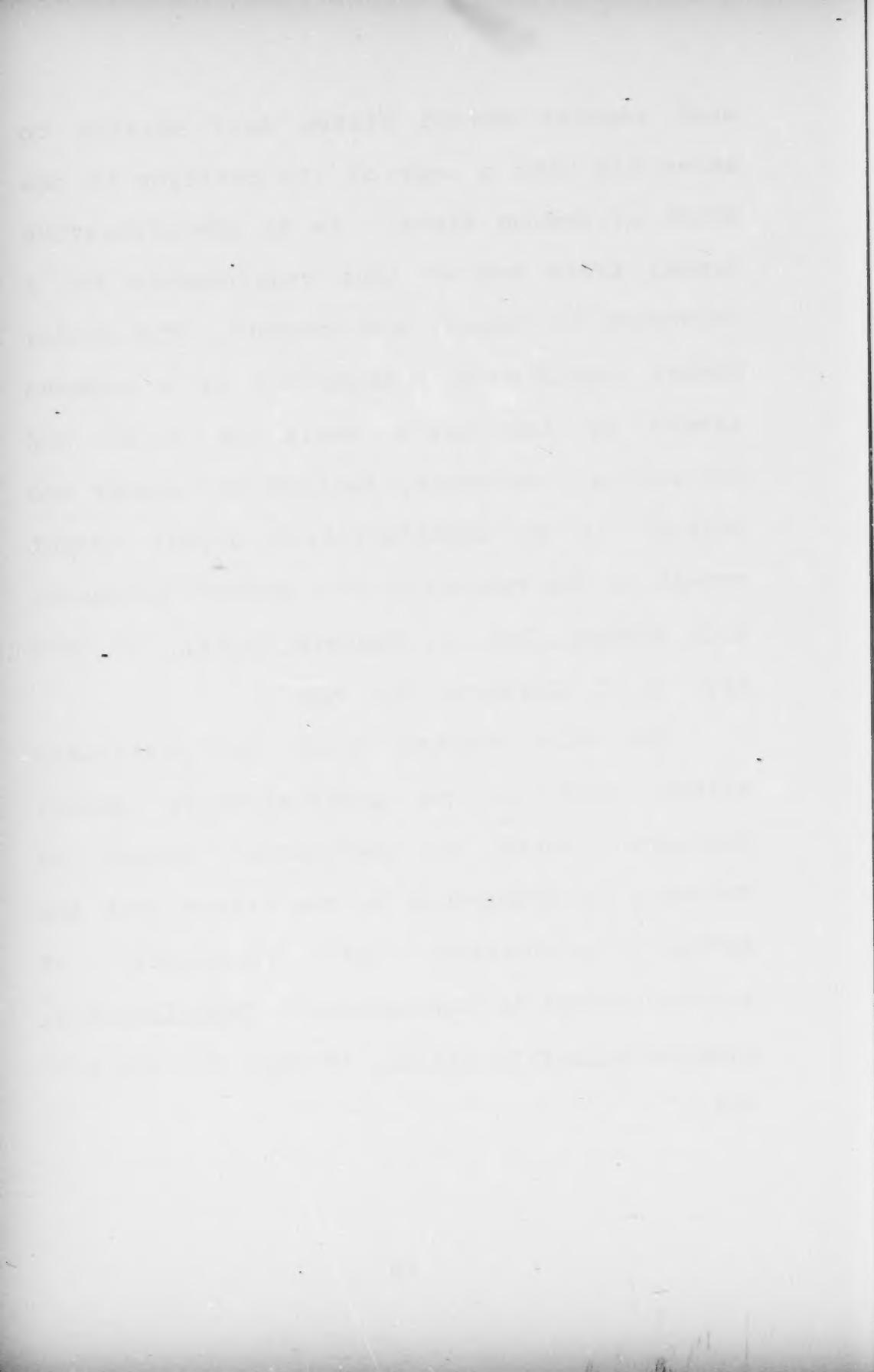
- (B) Such proceedings shall be initiated by the filing of a petition in court as provided in division (A) of this section and the service of a copy of the said petition upon the Commission and upon all parties who appeared before the Commission.

Petitioner followed 4112.06(B) in filing a petition in the Court and by making service upon all parties who appeared before the Commission. Respondent has never claimed that he was prejudiced by the fact that Petitioner

used regular United States mail service to serve him with a copy of its petition to the Court of Common Pleas. In an administrative appeal there are no true requirements for a defendant to "appear and defend". The 28-day answer requirement arising out of a summons issued by the Clerk would be false and misleading. Moreover, failure to "appear and defend" in an administrative appeal cannot result in the rendering of a default judgment.

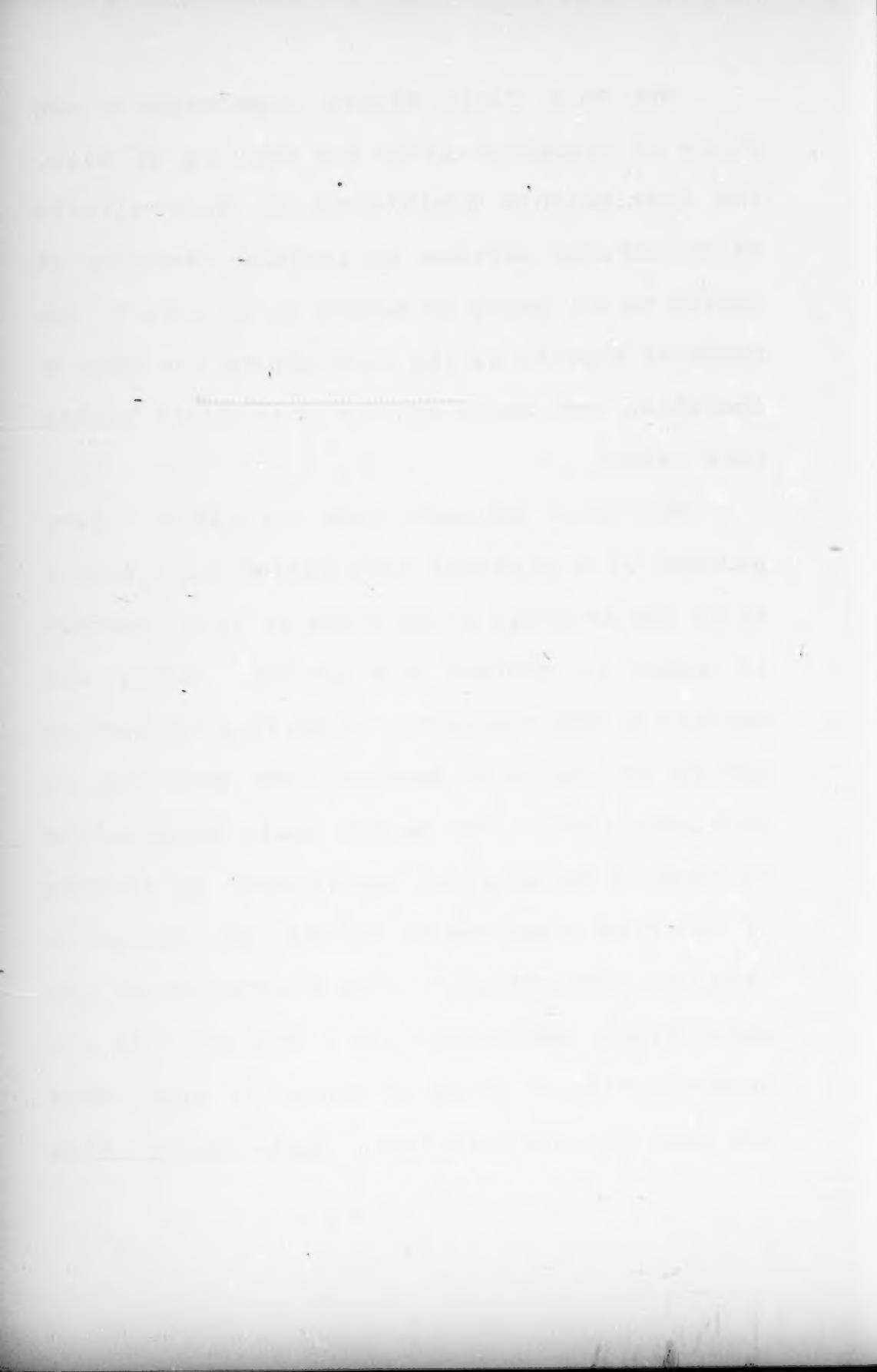
J.C. Sanson, Inc. v. Rodgers (1986), 30 Ohio App. 3d 77 (Cuyahoga Cty. App.).

The Ohio Supreme Court had previously stated that in an administrative appeal procedure where no particular method of delivery is prescribed by the statute that any method productive of certainty of accomplishment is countenanced. Dudu Kovich v. Housing Authority (1979), 58 Ohio St. 2nd 202, 204.



The Ohio Civil Rights Commission's own rules of procedure allow for service by mail. The Commission's Administrative Rule 4112-1-01(M) defines service to include "service of notice to any party in person or by mail." The Court of Appeals ruling contradicts the rule of operation set forth by the Ohio Civil Rights Commission.

The Ohio Revised Code § 124.42 lists passage of a physical examination as criteria to be met in order to be hired as fire fighters in order to protect the health, safety and welfare of the community. Specifically Section 124.42 of the Ohio Revised Code provides in pertinent part: "No person shall be eligible to receive an original appointment as fireman in a fire department unless he passed a physical examination." The discretion of the appointing authority is limited to a determination of which of three (3) applicants are most fit and qualified. State ex rel. King



v. Emmons, 128 O.S. 216, 190 N.E. 468 (1934). As a matter of course, the appointing authority would have the right to take into consideration the physical condition of the applicants in making its selection for the certified list.

State ex rel. Hoskins v. Board of Administration, 920 O.S. 459, 111 N.E. 283 (1915).

This Court (The Ohio Supreme Court) has recently held that it is an error to dismiss an administrative appeal where there has been substantial compliance with statutory requirements and no showing of surprise or unfair prejudice. Fisher v. Mayfield (1987), 30 Ohio St 3d 8. This is based upon the fundamental tenet in Ohio law that courts should strive to decide cases on their merits. Fisher supra at 11; National Mutual Insurance Co. v. Papenhagen (1987) 30 Ohio St. 3d 14, 15 (city DeHart v. Aetna Life Ins. Co. (1982) 69 Ohio St. 2d 189). "This laudable policy is



totally frustrated by the dismissal of an appeal on purely technical grounds without regard to the nature of the error or the fact that it was made in good faith." Papenhagen, supra at 15. Dismissal is a grossly disproportionate sanction where "no conceivable prejudice to the opposing party or to the Court could result from this minor, technical error." Id. at 16. The Court (The Supreme Court) also recently noted that where a party does not claim that "they were misled as to the sense or reason behind the notice of appeal... (and is)... well aware (of)... those facts and these legal determinations which would be the issue of the appeal," it is improper to dismiss an appeal on purely technical grounds. State ex rel. Ormet Corp. v. Burkhart, (1986), 25 Ohio St. 3d 112, 115. See also, Wells v. Chrysler Corp. (1984), 15 Ohio St. 3d 21, 24.

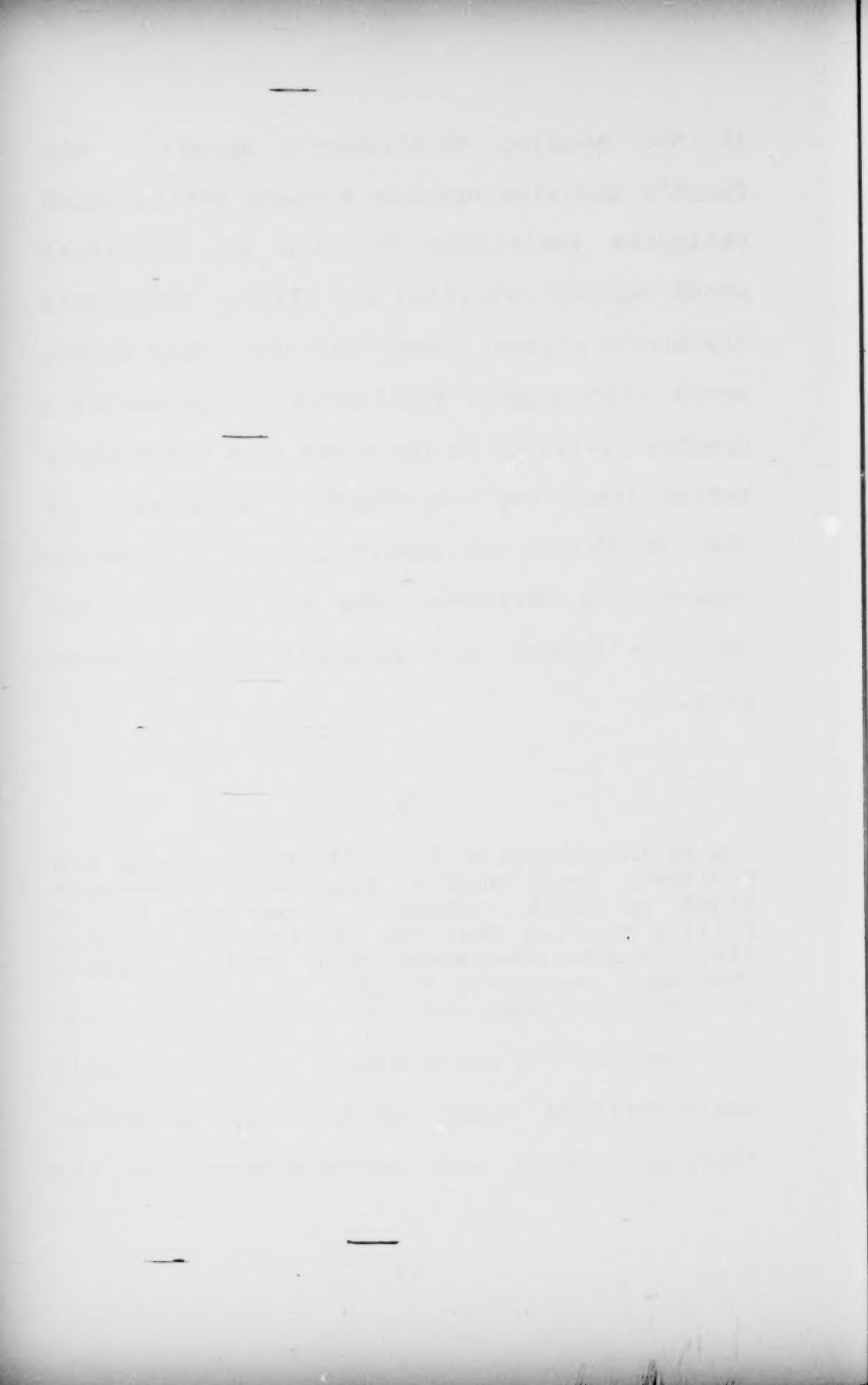
The Eighth District Court of Appeals denied Petitioner equal protection of the law

in not hearing Petitioner's appeal. The Court's decision upholds a lower ruling which obligates Petitioner to hire an individual whose medical condition and history would make his hiring illegal under Ohio law. Said hiring would also expose Petitioner to potentially greater liability in the event of a third-party action involving Respondent. Enforcement of the law should not result in such a negative impact upon Petitioner nor set precedent for negative impact upon potentially many other parties.

II.

The Eighth District Court Of Appeals Erred And Violated Petitioner's Fourteenth Amendment Right To Equal Protection Under The Law In Failing To Find That The Findings Of The Ohio Civil Rights Commission Were Invalid Because They Were Improperly Filed.

Section 4112-3-09(A) of the Ohio Administrative Code specifically provides: "Written report and recommendation at the



conclusion of the hearing and upon due consideration of the evidence addressed at the hearing and the oral argument and/or briefs of the parties and the commission attorney, the person or persons conducting the hearing shall submit to the commission, within sixty days, a written report setting forth his or their findings of fact and conclusions of law and a recommendation of action to be taken by the commission." (emphasis added).

The final reply brief of the Ohio Civil Rights Commission was filed on February 22, 1985. Under OAC 4112-3-09(A) the findings of fact and conclusions of law should have been filed within sixty (60) days thereafter. Instead, the findings of fact were not filed until August 14, 1985, one hundred and seventy three (173) days after the reply brief was filed. In State, Ex Rel. City of Cincinnati v. Ohio Civil Rights Commission, (1981) 2 Ohio App 3d 287 the Supreme Court of Ohio held: "...it,

(the Ohio Civil Rights Commission) must conform to the conduct of its business to procedures set out in the statutes or in rules adopted by the commission pursuant to statutory grants of authority." at 288. The court further stated: "Here the commission had a duty to do something, rather than simply allowing the complaint against the city to hang in limbo subject to the vagaries of some undefined process." at 288. The Court of Appeals, in its own decision, states "the commission would do well to heed the Supreme Court's admonition in Plumbers & Steamfitters Committee v. Ohio Civil Rights Commission, (1981), 66 Ohio St. 2d 192, 1196:

"(U)nusual delay can create serious hardships. Commission orders frequently involve awards of back pay. If the commission acts dilatorily, back pay awards can amount to large sums. Moreover, the longer the delay in resolving a commission complaint, the more

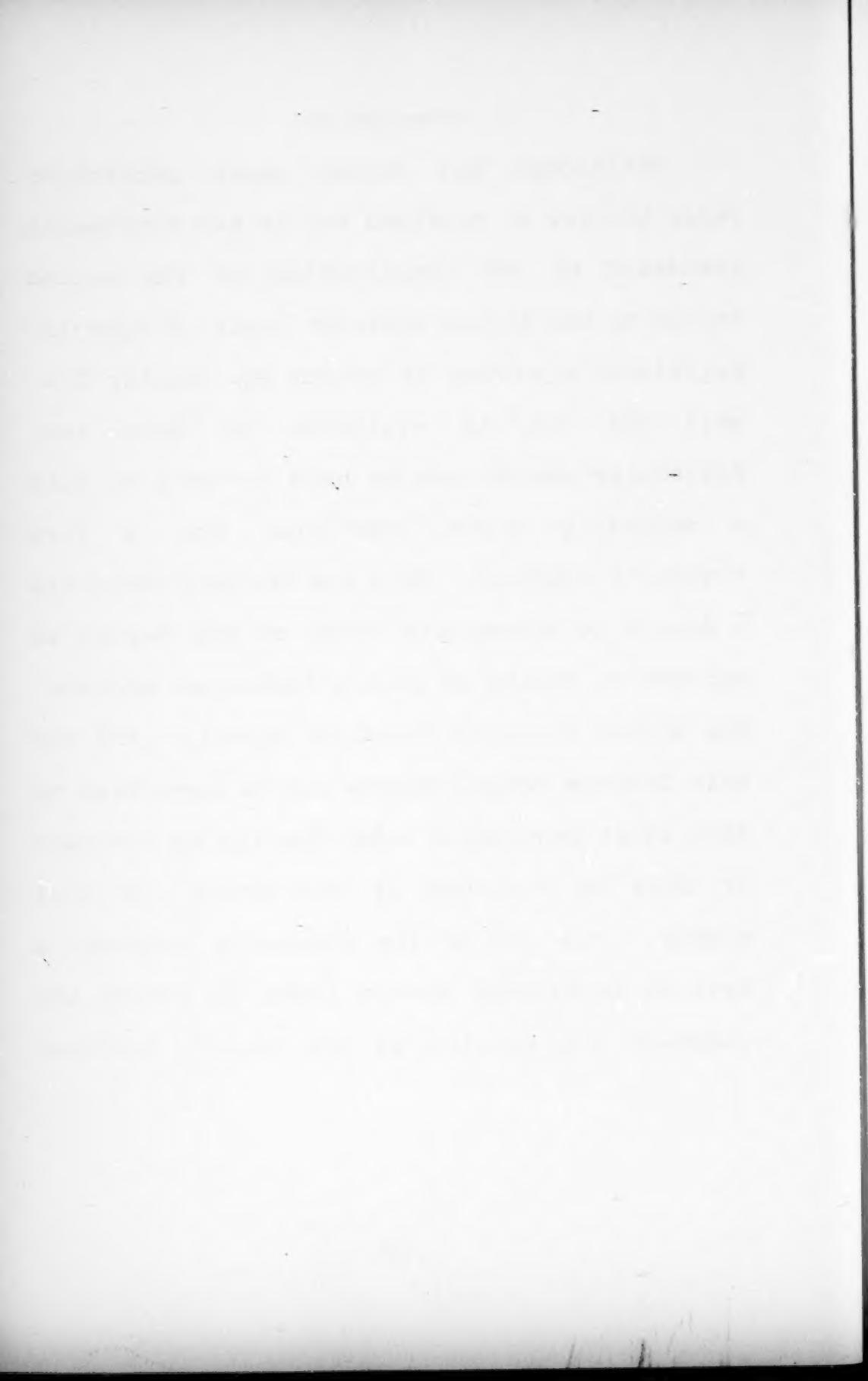
difficult it is to make an aggrieved party whole. Consequently, while we do not find that the 92-day period which elapsed between the commission's receipt of notice of appeal and the commission's certification of the record was unduly lengthy or prejudicial in this case, it behooves the commission to follow its legislative mandate and proceed as expeditiously as possible."

While the Court of Appeals was willing to allow the Civil Rights Commission to operate outside of its rules, it was not willing to approve of Petitioner's interpretation of the ambiguous notice provisions. Thus, that court held to a double standard. The untimeliness of the filing of the hearing examiner was a clear breach of the duty imposed on the Ohio Civil Rights Commission by the Ohio Administrative Code.

1

Conclusion

Petitioner was denied equal protection under the law as provided for in the Fourteenth Amendment to the Constitution of the United States by the Eighth District Court of Appeals. Petitioner's giving of notice by regular U.S. mail was not in violation of Ohio law. Petitioner should not be held to have to hire a medically unfit individual for a fire fighter's position. Ohio law further indicates a desire to adjudicate cases on the merits as opposed to ruling on purely technical grounds. The Eighth District Court of Appeals (and the Ohio Supreme Court) should not be permitted to deny equal protection under the law to citizens of Ohio or citizens of any state for that matter. For all of the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth District



Court of Appeals which was denied review by the
Supreme Court of Ohio.

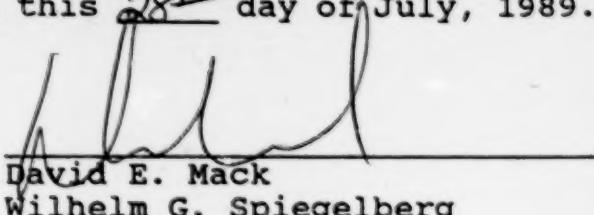
Respectfully submitted,

David E. Mack
Wilhelm G. Spiegelberg
City of Garfield Heights
5555 Turney Road
Garfield Heights, Ohio 44125
(216) 475-1100
Attorneys for Petitioner



Certificate of Service

This is to certify that three (3) copies of the foregoing "Petition For Writ of Certiorari From The Supreme Court of Ohio" were sent to each of William Asad, and Anthony J. Celebreeze, Jr. and Charles E. Cook at 7419 Plainfield Avenue, Brooklyn, Ohio 44144 and State Office Building, 12th Floor, 615 West Superior Avenue, Cleveland, Ohio 44113 by regular U.S. mail this 28th day of July, 1989.



David E. Mack
Wilhelm G. Spiegelberg



EXHIBIT A



STATE OF OHIO
CIVIL RIGHTS COMMISSION

IN THE MATTER OF:)
WILLIAM ASAD) COMPLAINT NO. 4050
Complainant)
-vs-) FINDINGS OF FACT,
CITY OF GARFIELD) CONCLUSIONS OF LAW,
HEIGHTS) AND ORDER
Respondent)

I. PRELIMINARY STATEMENT

This matter comes before the Commission upon the sworn Charge Affidavit of William Asad, Complainant, filed on May 24, 1983; Complaint and Notice of Hearing No. 4050 issued May 15, 1984; the timely Answer of the City of Garfield Heights, Respondent herein; the official record of the public hearing held on September 25, and October 26, 1984 before Franklin A. Martens, Esq., a duly appointed Hearing Examiner, and all exhibits therein; the



post-hearing briefs filed by the Commission on December 31, 1984 and February 22, 1985, and Respondent's brief filed on February 13, 1985.

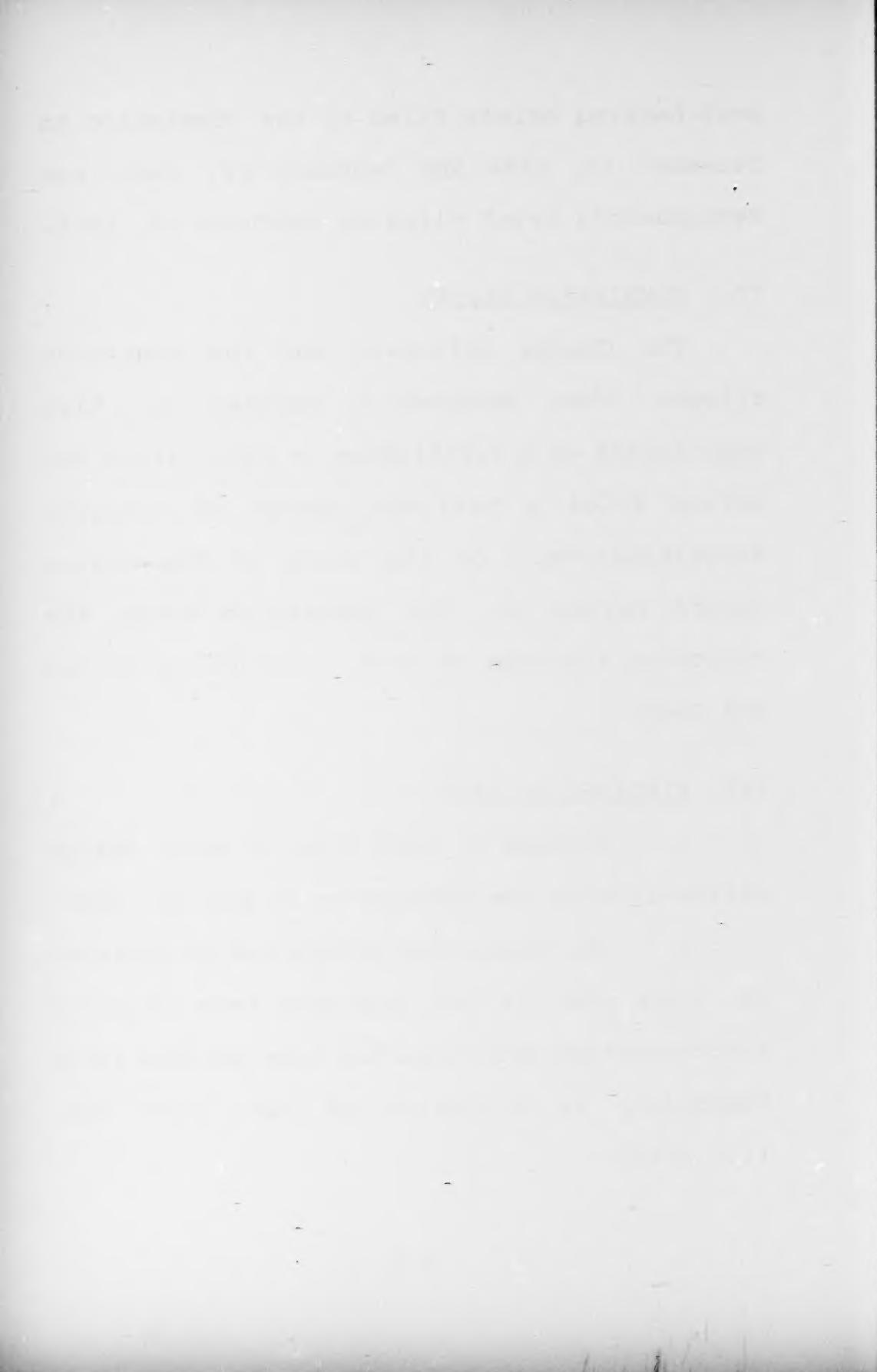
II. COMMISSION REVIEW

The Charge Affidavit and the Complaint alleged that Respondent refused to hire Complainant as a firefighter in retaliation for having filed a previous charge of unlawful discrimination. On the basis of the entire record before it, the Commission makes the following Findings of Fact, Conclusions of Law and Order.

III. FINDINGS OF FACT

1. William R. Asad filed a sworn charge affidavit with the Commission on May 24, 1983.

2. The Commission determined on December 29, 1983 that it was probable that unlawful discriminatory practices had been engaged in by Respondent in violation of Rev. Code Sec. 4112.02(I).



3. The Commission attempted to eliminate the alleged unlawful discriminatory practices by conciliation. The Commission issued its complaint after conciliation failed.

4. Respondent is a political subdivision of the State of Ohio and an employer.

5. Complainant applied for a firefighter position with Respondent on February 19, 1983. He passed the written civil service examination and the physical agility test. He was examined by the civil service physician and filled out a medical history form on June 29, 1982. He was given a polygraph test on February 5, 1983 and a background check was conducted. His name was placed on the certified list of applicants and sent to the city for a personal interview. He was interviewed by the Safety Director, the Fire Chief, and the Mayor on May 6, 1983.

6. Complainant was questioned in detail during the interview about his medical history form because he answered "yes" to questions "Do



you now have or have you ever had . . . frequent severe headaches, . . . dizziness or fainting spells, . . . paralysis, . . . shortness of breath, . . . chronic cough, . . . backache, . . . and depression or excessive worry." Complainant was asked about each of these conditions and he explained that they had occurred during his previous firefighting experience with the city of Brooklyn when he sustained an injury fighting a fire. Complainant also explained that he no longer suffered from any of these conditions.

7. Complainant was also questioned in detail about his separation from employment with the Brooklyn Fire Department. He was discharged from that position. One of the interviewing committee also asked Complainant about the circumstances surrounding his dismissal. During that discussion Complainant mentioned he had filed EEOC charges against the City of Brooklyn and had two federal court



suits pending because of discrimination and one in municipal court because of negligence. (Complainant filed a charge with the EEOC and the Commission, naming the City of Brooklyn Fire Department as Respondent, on May 28, 1981, alleging that his national origin, Lebanese, was a determining factor in his discharge.)

8. Complainant was not chosen for any of the available firefighter positions because the interviewing committee was concerned about his medical history. One member, the safety director, was also concerned about the law suits that Complainant had filed against the City of Brooklyn. He believed Complainant should not be considered further until he cleared up any law suits he had pending against the City of Brooklyn.

9. Complainant filed a charge of discrimination and opposed allegedly unlawful employment practices by filing a lawsuit. Respondent was aware that Complainant filed the



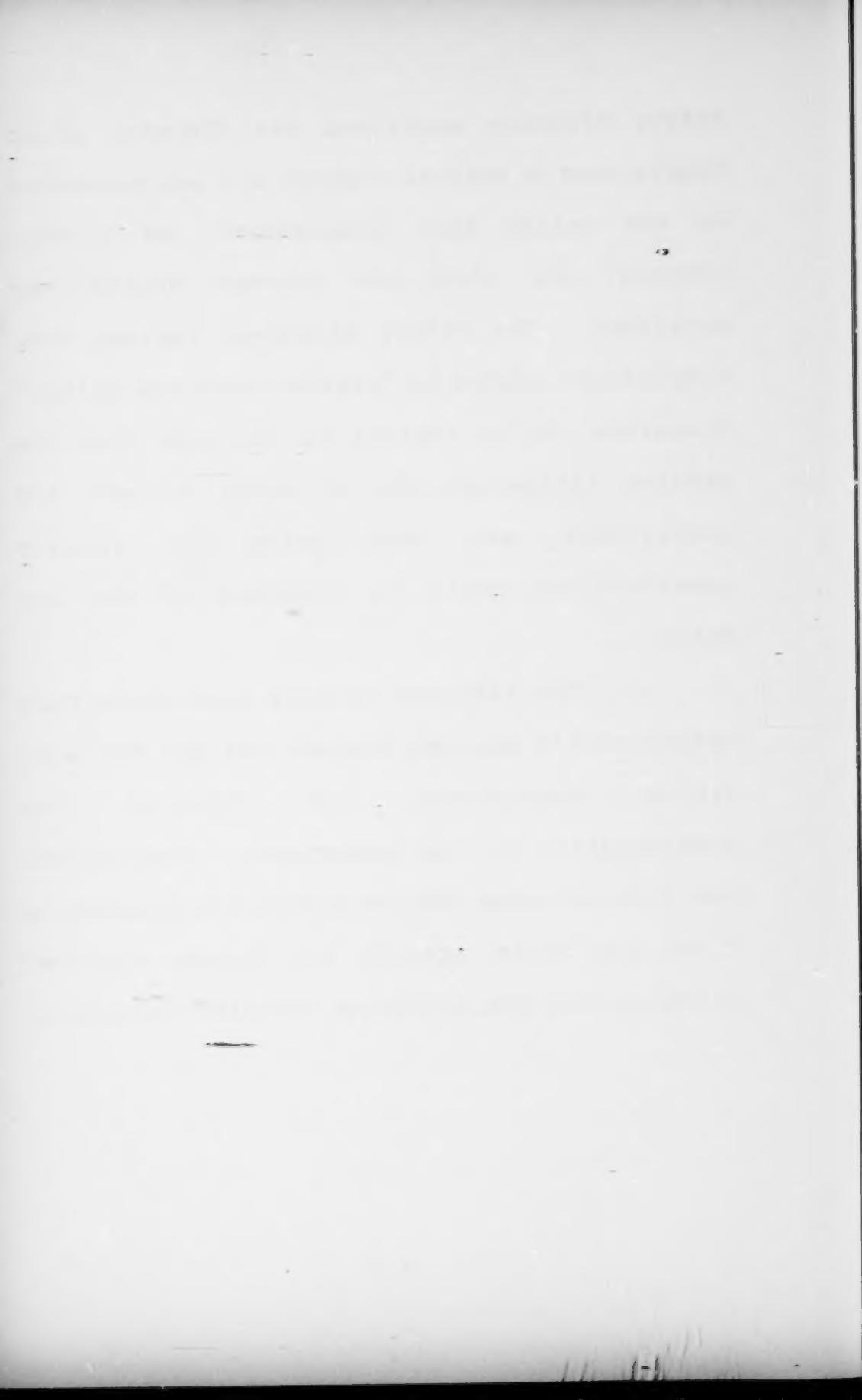
lawsuit. Respondent denied Complainant a firefighter position and refused to consider him for subsequent positions. The Safety Director refused to give Complainant further consideration for a firefighter position because he had filed law suits against his former employer alleging his former employer was guilty of discrimination.

10. The Respondent offered a legitimate nondiscriminatory reason for its action, Complainant's medical history. However, this was not the only reason Complainant was denied the position. The Safety Director was concerned about Complainant's pending law suits. He denied Complainant further consideration until the law suits were cleared up. This was established by evidence that during the selection process Complainant asked a friend to call the Safety Director and ask him about the status of Complainant's application. During the phone conversation the



Safety Director mentioned his concerns about Complainant's medical history and was reassured by the caller that Complainant was a "Mr. Lebanon" and that his current health was excellent. The Safety Directory replied that Complainant needed to "settle those law suits." Therefore, it is logical to conclude that the pending litigation was of equal concern and Complainant was not going to receive consideration until he disposed of the law suits.

11. The evidence in this case shows that Complainant's medical history was not the only reason Complainant was rejected for consideration by the Respondent. Complainant was also rejected for consideration because he filed law suits against his former employer alleging that his discharge was discriminatory.



IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties of this Complaint.

2. The Commission has proven by reliable, probative, and substantial evidence that Respondent has discriminated against Complainant because of retaliation in violation of Section 4112.02(I) of the Revised Code.

V. ORDER

Pursuant to Revised Code Section 4112.05(G), where the Commission has obtained jurisdiction over the parties and over the subject matter of its proceedings, and has proven by reliable, probative, and substantial evidence on the record that Respondent has engaged in unlawful discrimination, the Commission is authorized and obligated to issue the Order which is set forth hereinafter.

1. It is ORDERED that Respondent shall henceforth and forever CEASE AND DESIST from

all practices in violation of Revised Code Section 4112.

2. It is further ORDERED that Respondent offer Complainant the next available position of firefighter. Complainant will be instated with all rights, benefits, seniority, privileges, and rate of pay as if he had been hired as a firefighter in May of 1983. This offer shall be in writing and sent by certified mail.

3. It is further ORDERED that, whether or not Complainant accepts the position offered by Respondent, Respondent pay Complainant the difference between what Complainant has earned in his current firefighter position and what Complainant would have earned had he been employed by Respondent as a firefighter from the date Complainant was first rejected for employment to the date Respondent offers Complainant employment, the deductions to be computed on an annual basis, plus interest at



the maximum rate allowable by law. The backpay shall include all normal incremental increases of salary and any normally worked overtime. This calculation of backpay continues to run until Complainant is reinstated pursuant to above Paragraph 2 of this Order or until Respondents make an offer of employment pursuant to Paragraph 2 of this Order and Complainant reject such offer.

This ORDER Issued by the Ohio Civil Rights Commission this 14th day of November, 1985.

/s/ Rev. Phale D. Hale
REV. PHALE D. HALE, Chairman

/s/ Alyce Lucas
ALYCE LUCAS, Member

/s/ Ronald Morgan
RONALD MORGAN, Member

/s/ Catherine Ellis
CATHERINE ELLIS, Member

/s/ Jose Villanueva
JOSE VILLANUEVA, Member



NOTICE OF RIGHT TO JUDICIAL REVIEW

Notice is hereby given to all herein that Revised Code Section 4112.06(A), (B), (E), and (I) set forth the right to obtain judicial review of this ORDER and the mode and procedure thereof.

CERTIFICATE OF SERVICE

I, Robert Brown, Executive Director of the Ohio Civil Rights Commission, do hereby certify that the foregoing is a true and accurate copy of the ORDER Issued In the Matter of William Asad v. City of Garfield Heights, Complaint No. 4050 and filed with the Commission at its Central Office in Columbus, Ohio.

/s/ Robert Brown
ROBERT BROWN
Executive Director

Date: November 14, 1985



EXHIBIT B



THE STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

IN THE COURT
OF COMMON PLEAS
CASE NO. 102724

CITY OF GARFIELD HEIGHTS,)
)
Plaintiff-Appellant,)
)
vs.)
)
WILLIAM ASAD,)
)
Defendant-Appellee.)

JUDGMENT ENTRY

Burt W. Griffin, J.:

This is an appeal from a decision of the Ohio Civil Rights Commission requiring the City of Garfield Heights to hire William Asad as a firefighter. The case is currently before the Court on the Ohio Civil Rights Commission's motion to dismiss and on the briefs of the parties for a decision on the merits of the claim. The Court has previously denied a motion to dismiss filed by appellee Asad.

The City of Garfield Heights seeks reversal on the ground that there was not a proper factual basis for the Commission to



conclude that Asad was denied employment for statutorily prohibited reasons, that the hearing examiner's report was not timely filed in the Commission proceedings and that the Commission failed to make a good faith effort to conciliate and mediate the complaint. The Commission has denied the validity or sufficiency of those claims and further asserts that the appeal should be dismissed because appellant did not properly serve its petition.

The Ohio Civil Rights Commission made the following determination after receiving testimony and reviewing the briefs submitted by the parties:

(VOL 982 PG 139)

* * *

11. The evidence in this case shows that Complainant's medical history was not the only reason Complainant was rejected for consideration by the Respondent. Complainant was also rejected for consideration because he filed lawsuits against his former employer

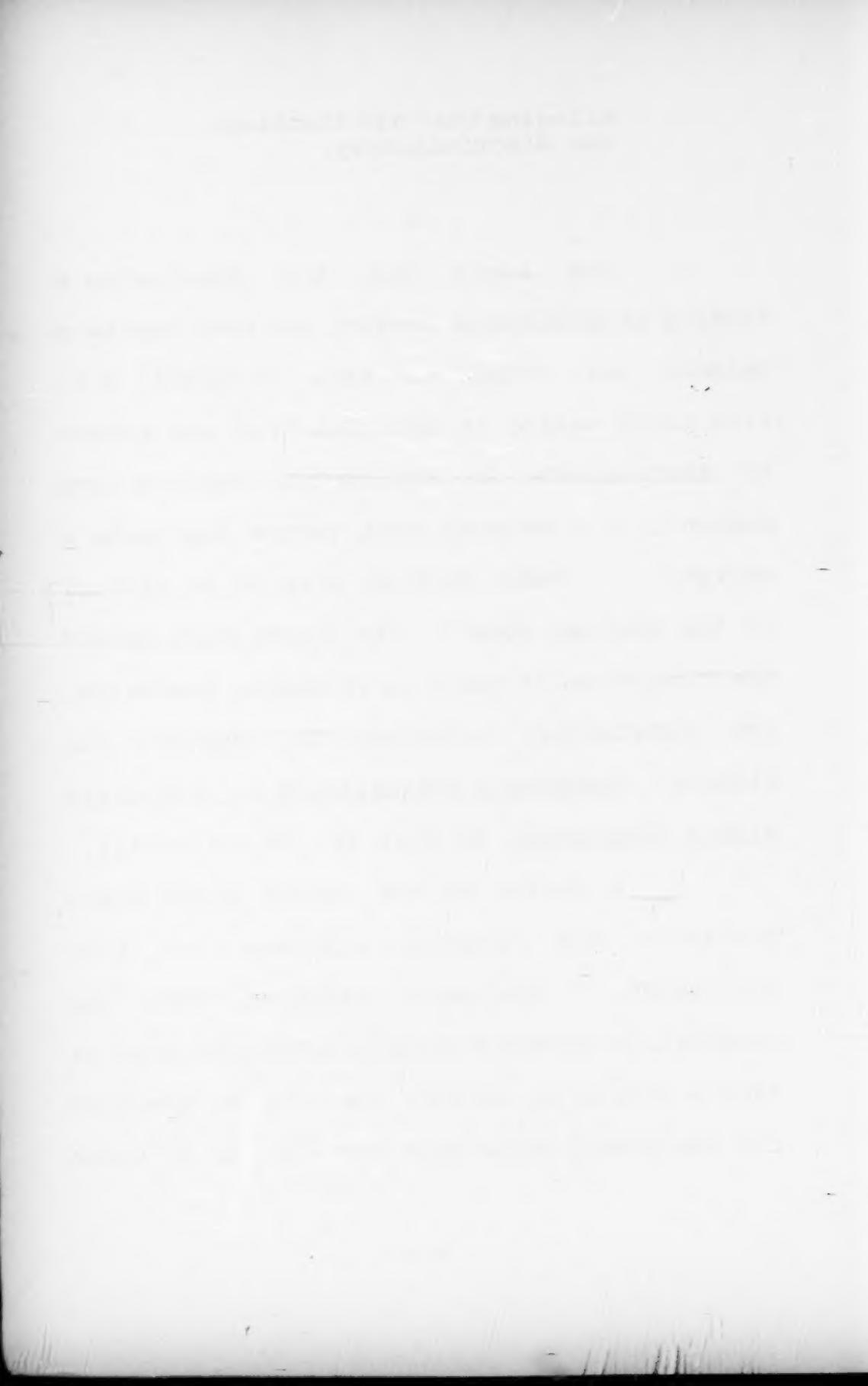


alleging that his discharge
was discriminatory.

I

The basis for the Commission's finding of prohibited conduct was that Garfield Heights was found to have violated R.C. §4112.02(I) making it unlawful "for any person to discriminate in any manner against any person . . . because that person has made a charge . . . under Section 4112.01 to 4112.07 of the Revised Code." The Court must uphold the Commission if there is reliable, probative, and substantial evidence to support its finding. Plumbers & Steamfitters v. Ohio Civil Rights Commission, 66 Ohio St. 2d 192 (1981).

A review of the record shows ample probative and reliable evidence for that conclusion. Testimony affirmed that the responsible Garfield Heights officials knew of Asad's complaint against the City of Brooklyn for employment discrimination and one of those

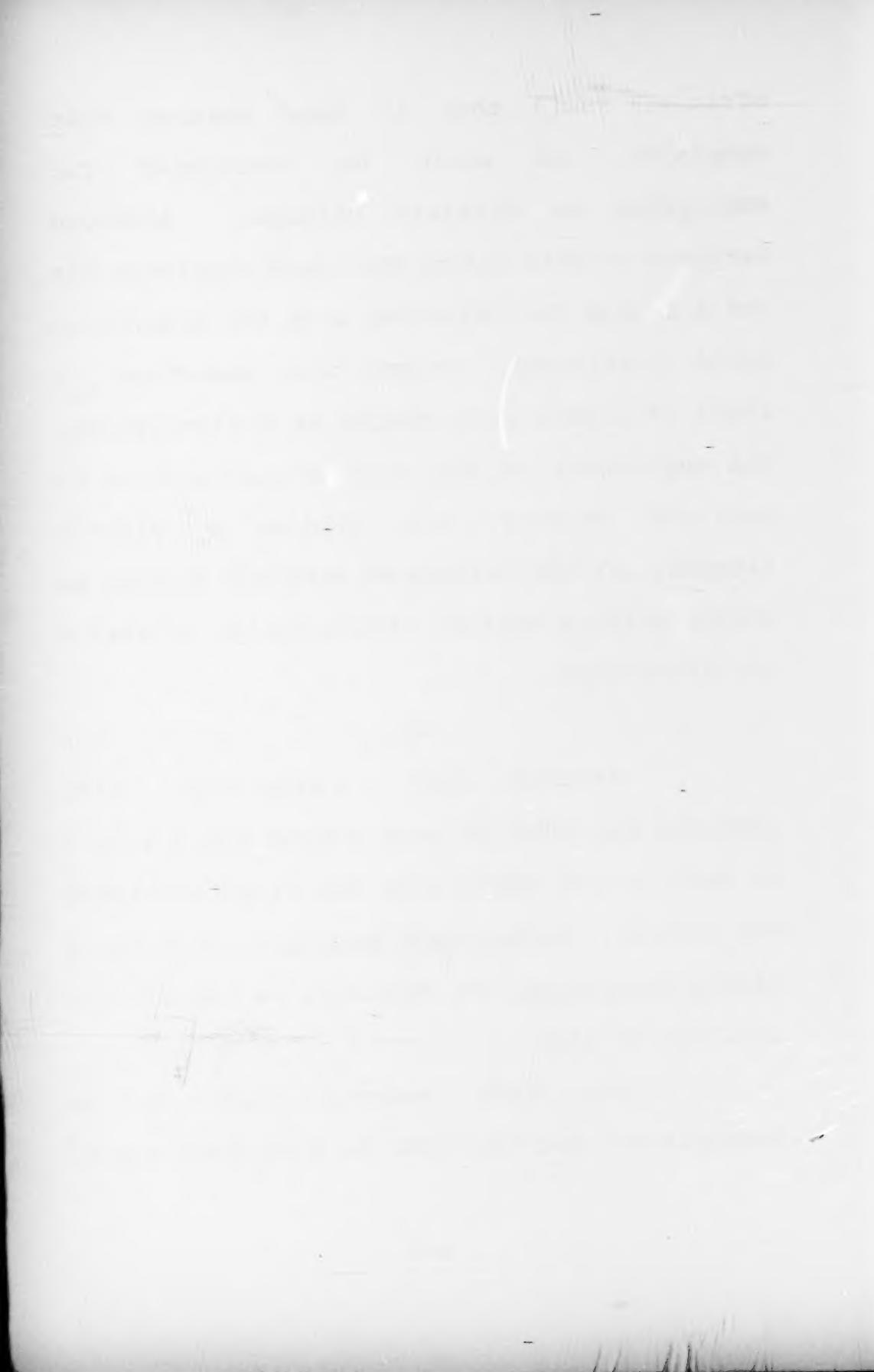


officials said that if Asad settled that complaint, he would be considered for employment by Garfield Heights. Although Garfield Heights claims that such complaint was not a reason for rejecting Asad the Commission could justifiably reject that assertion in light of Asad's past record as a firefighter, his employment at the time of application to Garfield Heights, - his holding a pilot's license, and the failure of Garfield Heights to pursue fully a medical determination of Asad's qualifications.

II

Revised Code 4112.05(B) also requires the OCRC to make a good faith effort to mediate and conciliate the dispute between the parties. Harbor Park Marinas v. Ohio Civil Rights Commission, 64 Ohio App. 2e 120 (1978). (VOL 982 FG 140)

The City asserts that it is inconsistent for the OCRC to find that a pre-



hire medical examination is illegal and then to mediate the dispute by requiring a new, pre-hire medical examination. As Garfield Heights correctly asserts, there is no legal basis to conclude that a pre-hire examination is illegal. The apparent inconsistencies in the position of the OCRC does not render its mediation attempt invalid; and, in fact, the record does not support a claim that the Commission failed to attempt to mediate and conciliate the complaint.

III

Section 4112-3-09(A) of the Ohio Administrative Code provides that the hearing examiner shall issue written findings within sixty (60) days of the hearing. In the present case, one hundred seventy-three (173) days passed between the hearing and the issuance of written findings. Neither the Administrative Code nor the Revised Code provide that failure of the hearing examiner to file timely his



written findings will render those findings or their adoption by the OCRC invalid.

In State ex rel. City of Cincinnati v. Ohio Civil Rights Commission, 2 Ohio App. 3d 287 (1981), the petitioner sought a writ of mandamus directing the OCRC to dismiss a complaint because the evidentiary hearing was reopened following the complainant's untimely objections to the written report. The court found that the OCRC lacked authority to permit such tardy objections. The court issued the writ of mandamus ordering the OCRC to do that which it would have done if it had not erred in permitting the tardy objections--dismiss the complaint.

The facts in the case relied upon by the City are readily distinguished from the case at bar. Neither the City nor Mr Asad was prejudiced by any act

(VOL 982 PG 141)



of the hearing examiner or the OCRC in delaying the issuance of the written findings.

Since the decision of the Commission is supported by reliable, probative and substantial evidence and is in accordance with law, the decision of Ohio Civil Rights Commission is affirmed.

IT IS SO ORDERED.

/s/ Burt W. Griffin
BURT W. GRIFFIN, JUDGE

DATED: September 16, 1987

RECEIVED FOR FILING
SEP 17 1987

By Gerald E. Fuerst



NOTICE OF SERVICE

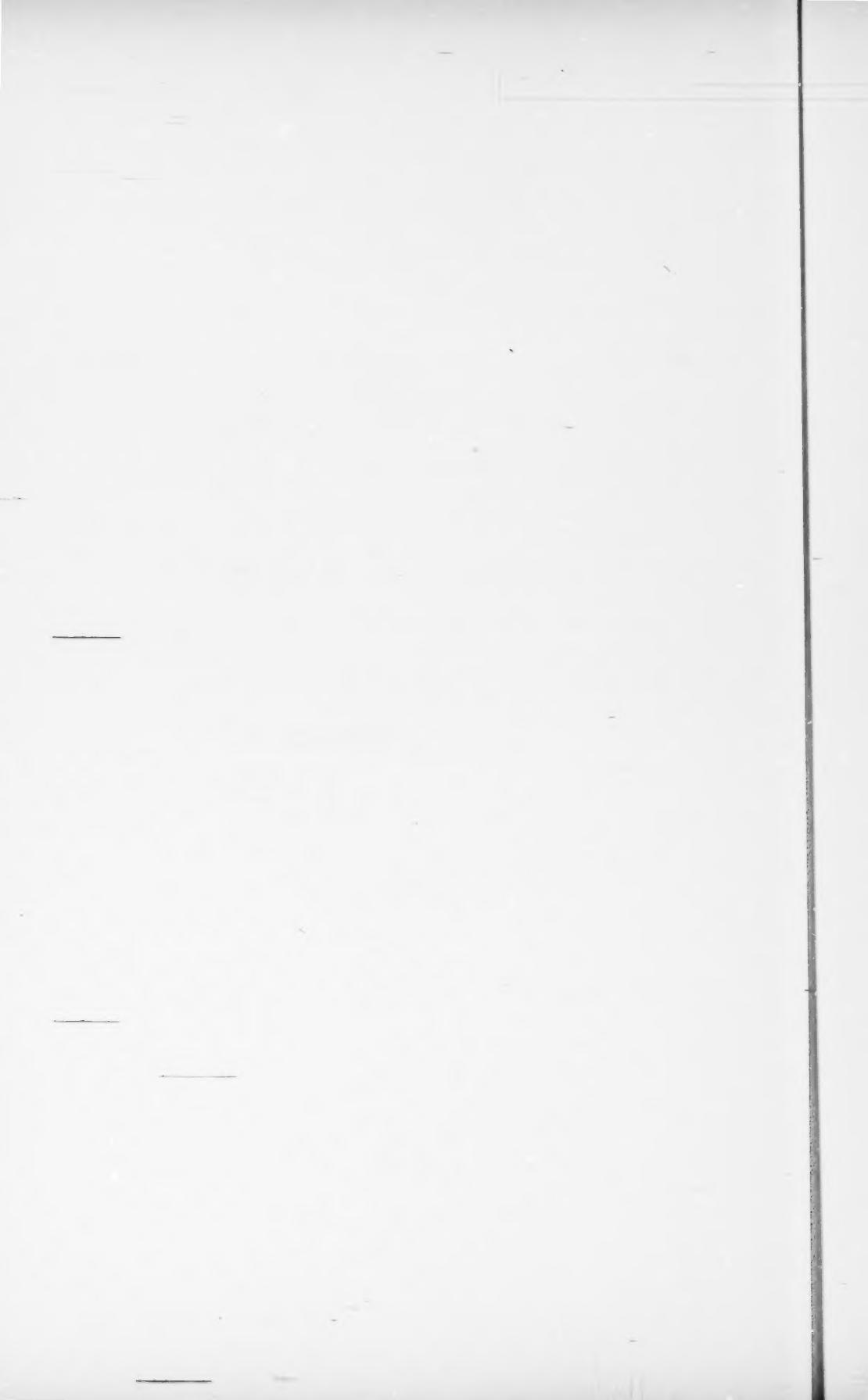
A copy of the foregoing Judgment Entry has been sent via ordinary U. S. Mail on this 16th day of September, 1987, to Anthony J. Celebrezze, Jr., Ohio Attorney General, and Diane J. Karpinski, Assistant Attorney General, 800 State Office Building, 615 West Superior Avenue, Cleveland, Ohio 44113-1 and to David E. Mack, Director of Law, City of Garfield Heights, 5555 Turney Road, Garfield Heights, Ohio 44125.

/s/ Burt W. Griffin, Judge
BURT W. GRIFFIN, JUDGE

(VOL 982 PG 142)



EXHIBIT C



COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 54615

CITY OF GARFIELD HEIGHTS : JOURNAL ENTRY
Plaintiff-Appellant : and
-vs- :
WILLIAM ASAD : OPINION
Defendant-Appellee : RECEIVED
: NOV 14 1988
: Law Department
: City of Garfield Hts.

DATE OF ANNOUNCEMENT OF DECISION: NOV 10 1988

CHARACTER OF PROCEEDING: Civil appeal from
Common Pleas Court
Case No. 102,724

JUDGMENT: Dismissed.

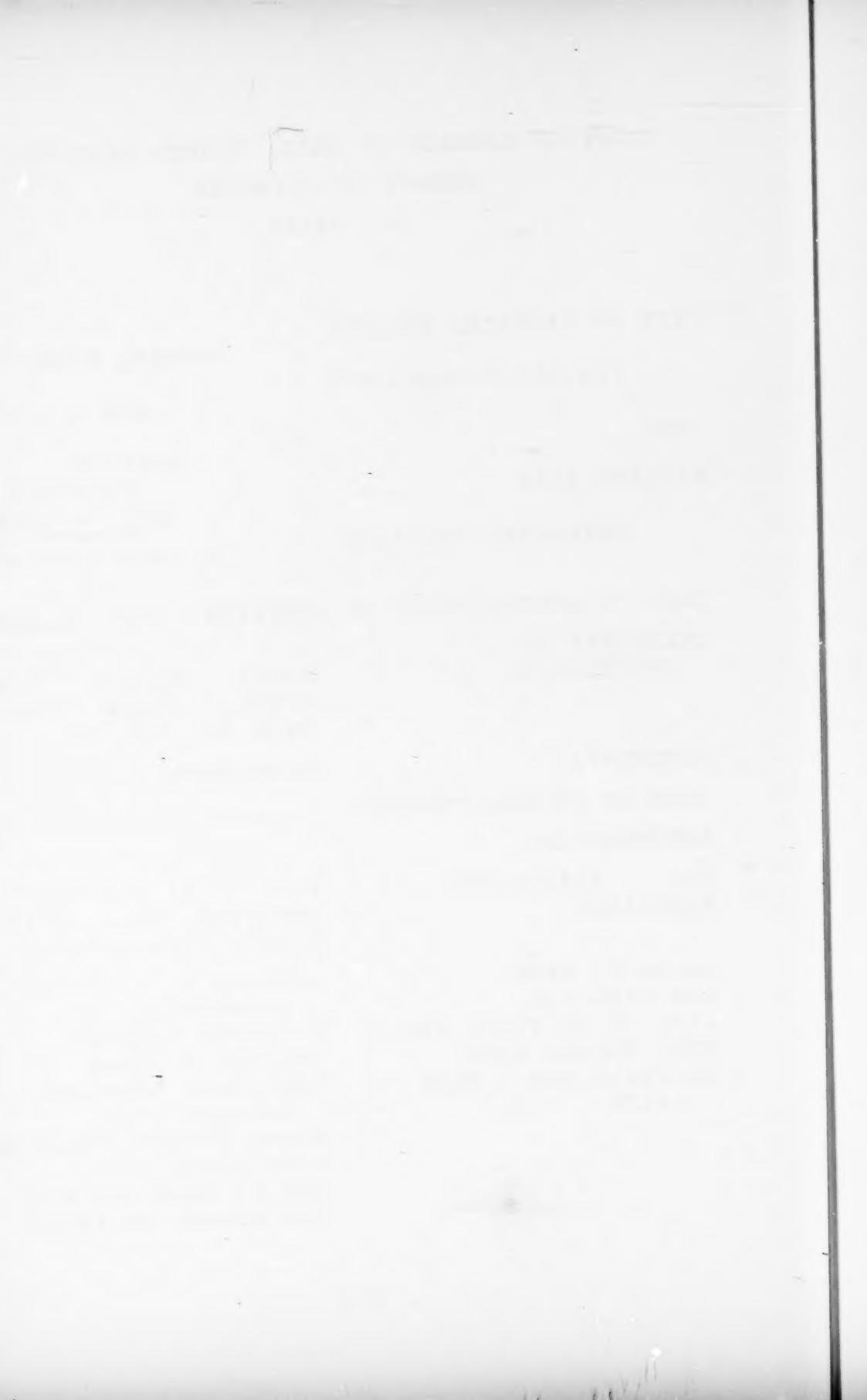
DATE OF JOURNALIZATION: _____

APPEARANCES:

For Plaintiff- Appellant: For Defendant- Appellee Ohio Civil Rights Commission:

David E. Mack
Law Director
City of Garfield Hts.
5555 Turner Road
Garfield Hts., Ohio
44125

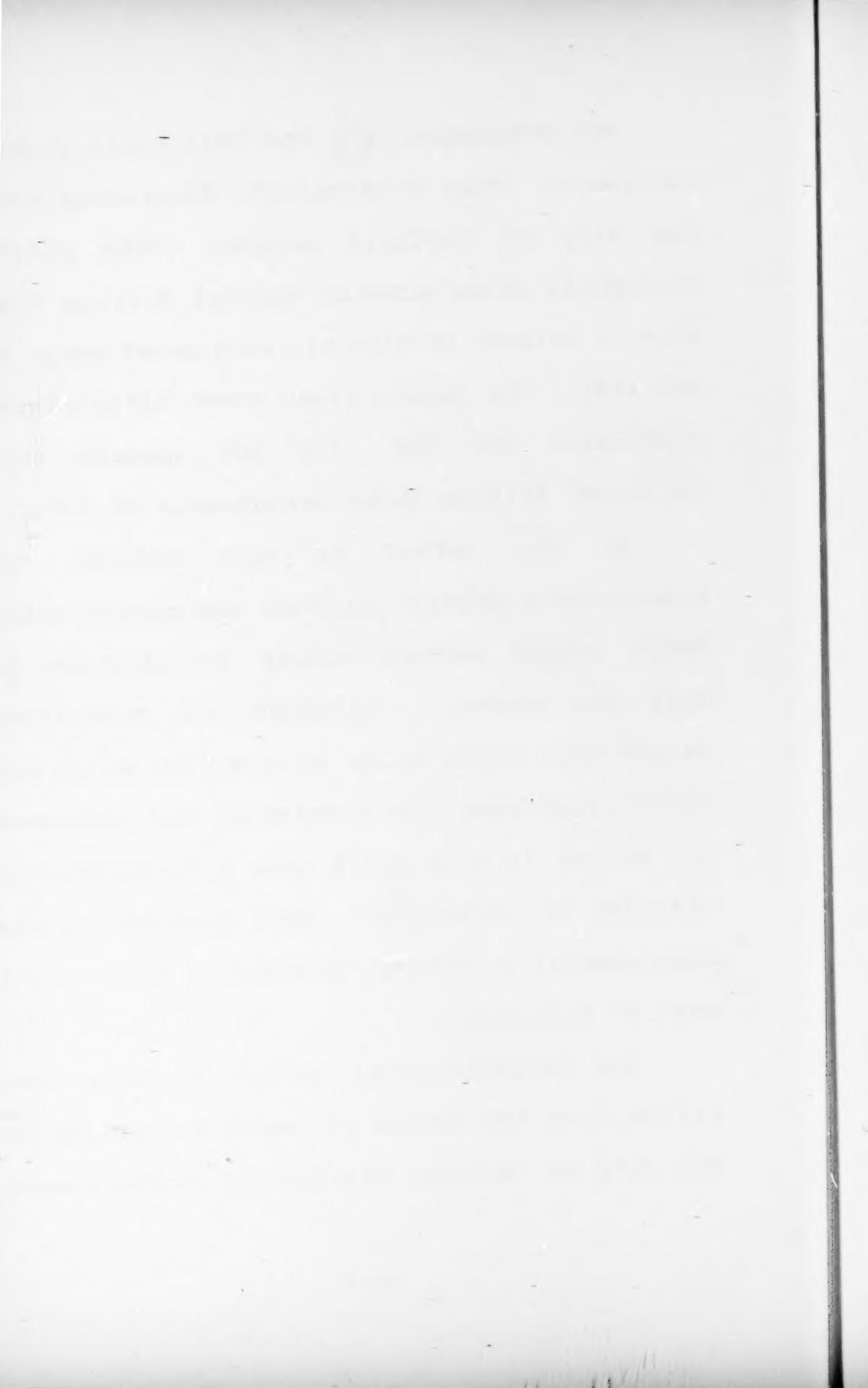
Anthony J.
Celebreeze, Jr.
Attorney General
Charles E. Cook
Assistant Attorney
General
State Office Building
12th Floor
615 W. Superior Ave.
Cleveland, OH 44113



Ann McManamon, J. The Ohio Civil Rights Commission ("the commission") determined that the city of Garfield Heights ("the city") unlawfully discriminated against William Asad when it refused to hire him as a firefighter in May 1983. The common pleas court affirmed the commission and the city now appeals that decision, raising three assignments of error.

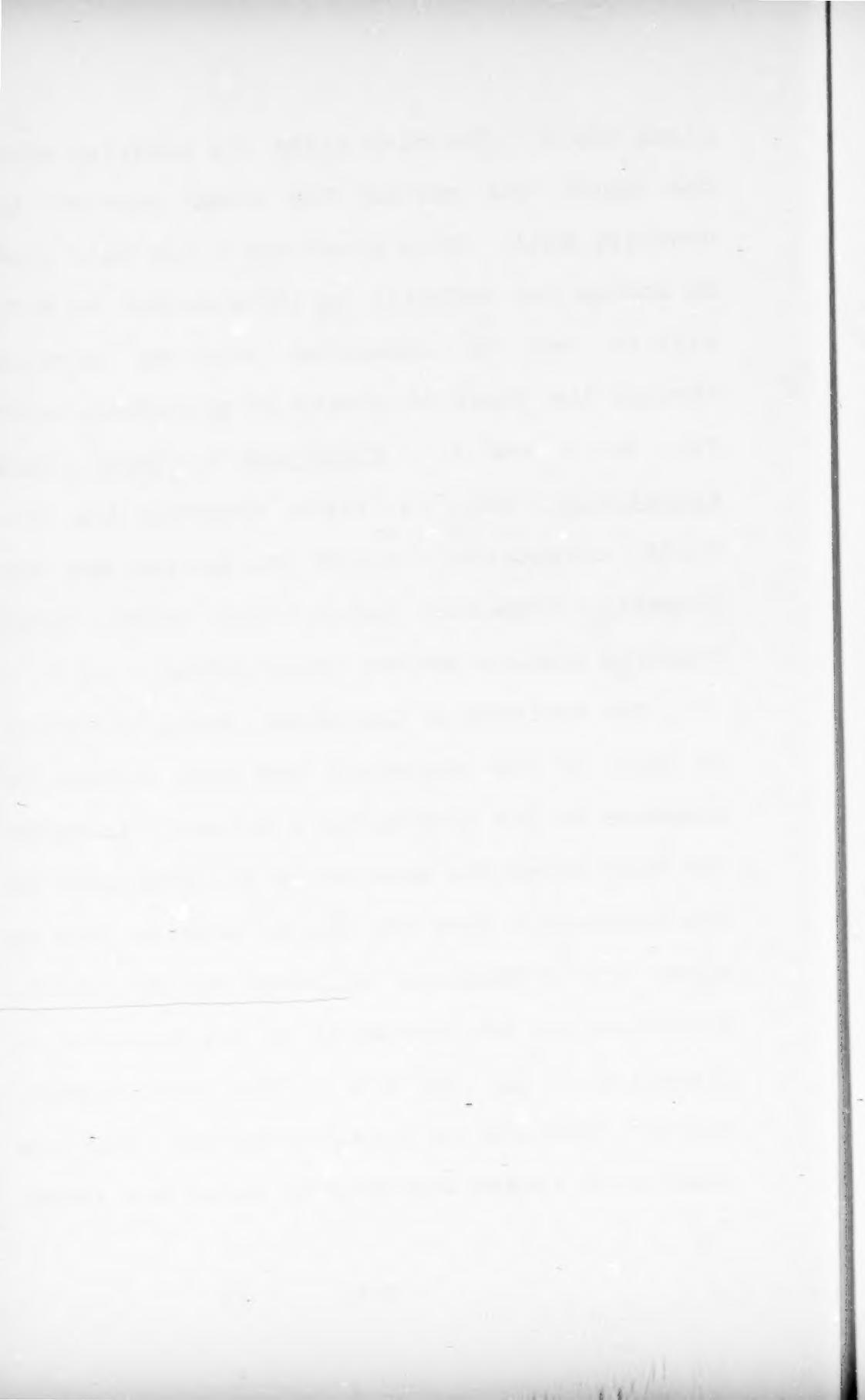
At the outset we must address the commission's contention that the common pleas court lacked subject matter jurisdiction to hear the appeal. Although the commission raised this issue below by a motion which was never ruled upon, the commission has addressed the matter in this court with a "Supplemental Citation to Authority." Upon considering the supplemental authority we conclude this appeal must be dismissed.

The jurisdictional defect in this case arises from the method of service employed by the city to initiate its action in the common



pleas court. The city filed its petition with the court and served the other parties by ordinary mail. This court has since held that an action for judicial review pursuant to R.C. 4112.06 may be commenced only by service through the clerk of courts in accordance with Civ. R. 3 and 4. Cleveland v. Ohio Civil Rights Comm. (Dec. 24, 1987), Cuyahoga App. No. 53095, unreported. Since the action was not properly commenced below, the court never acquired subject matter jurisdiction. Id.

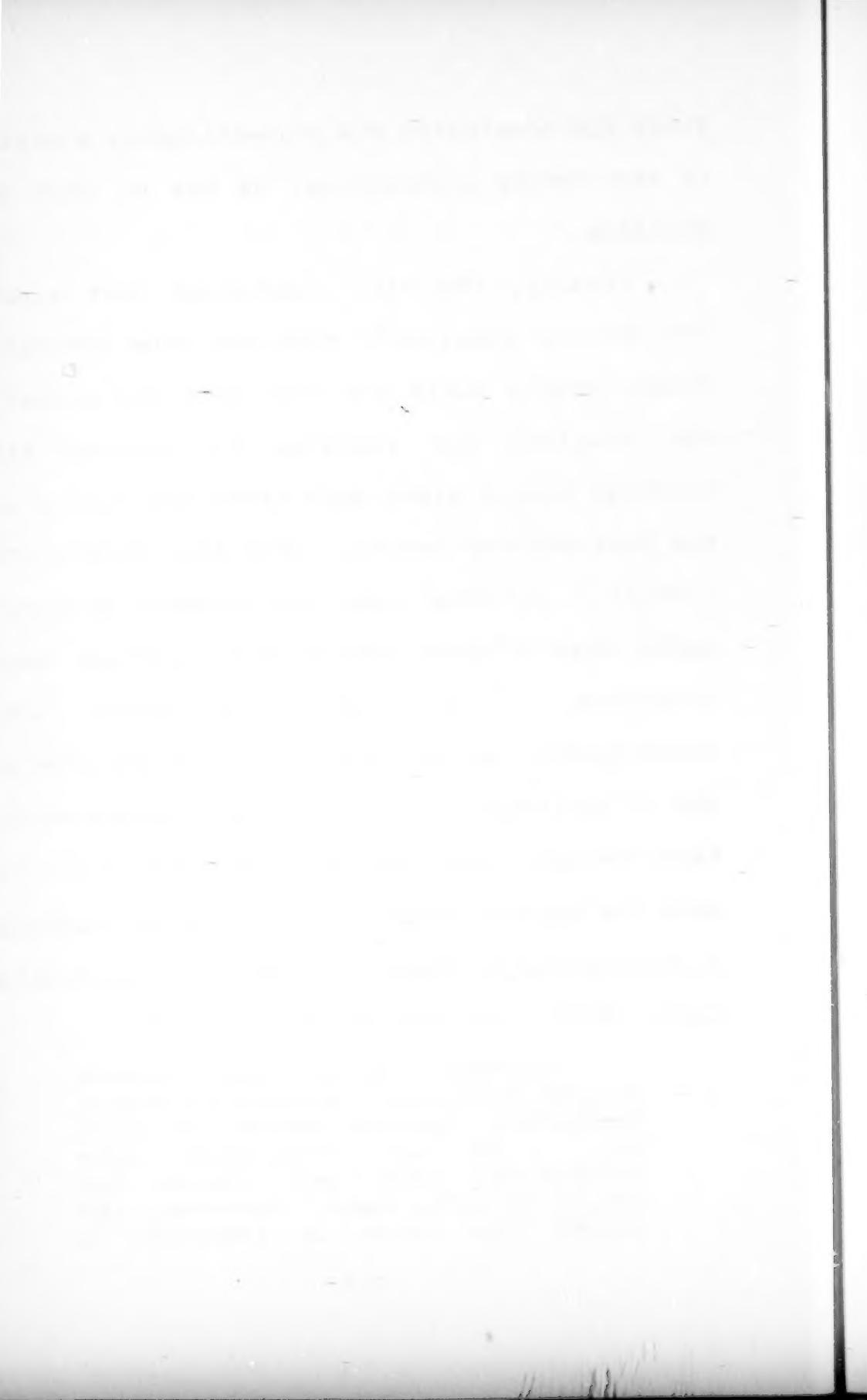
Our decision in Cleveland, supra, disposes of most of the arguments the city raised in response to the commission's motion. Although the city noted the absence of any prejudice to the commission from the faulty service, and we agree the commission suffered no detriment, prejudice was not the basis of our decision in Cleveland. Id. at 8-9. The city argued, without citation to legal authority, that the commission lacked standing to raise the issue.



Since the commission was unquestionably a party to the review proceedings, we see no lack of standing.

Finally, the city complained that since the hearing examiner's findings were untimely filed, Asad's claim was void from the outset. The examiner was required to present his findings within sixty days after the filing of the post-hearing briefs. Ohio Adm. Code 4112-3-09(A). In this case one hundred seventy-three days elapsed before the findings were submitted. Although this delay was inexplicable, we fail to see how it implicated the jurisdiction of the commission. Nevertheless, the commission would do well to heed the supreme court's admonition in Plumbers & Steamfitters Commt. v. Ohio Civil Rights Comm. (1981), 66 Ohio St. 2d 192, 196:

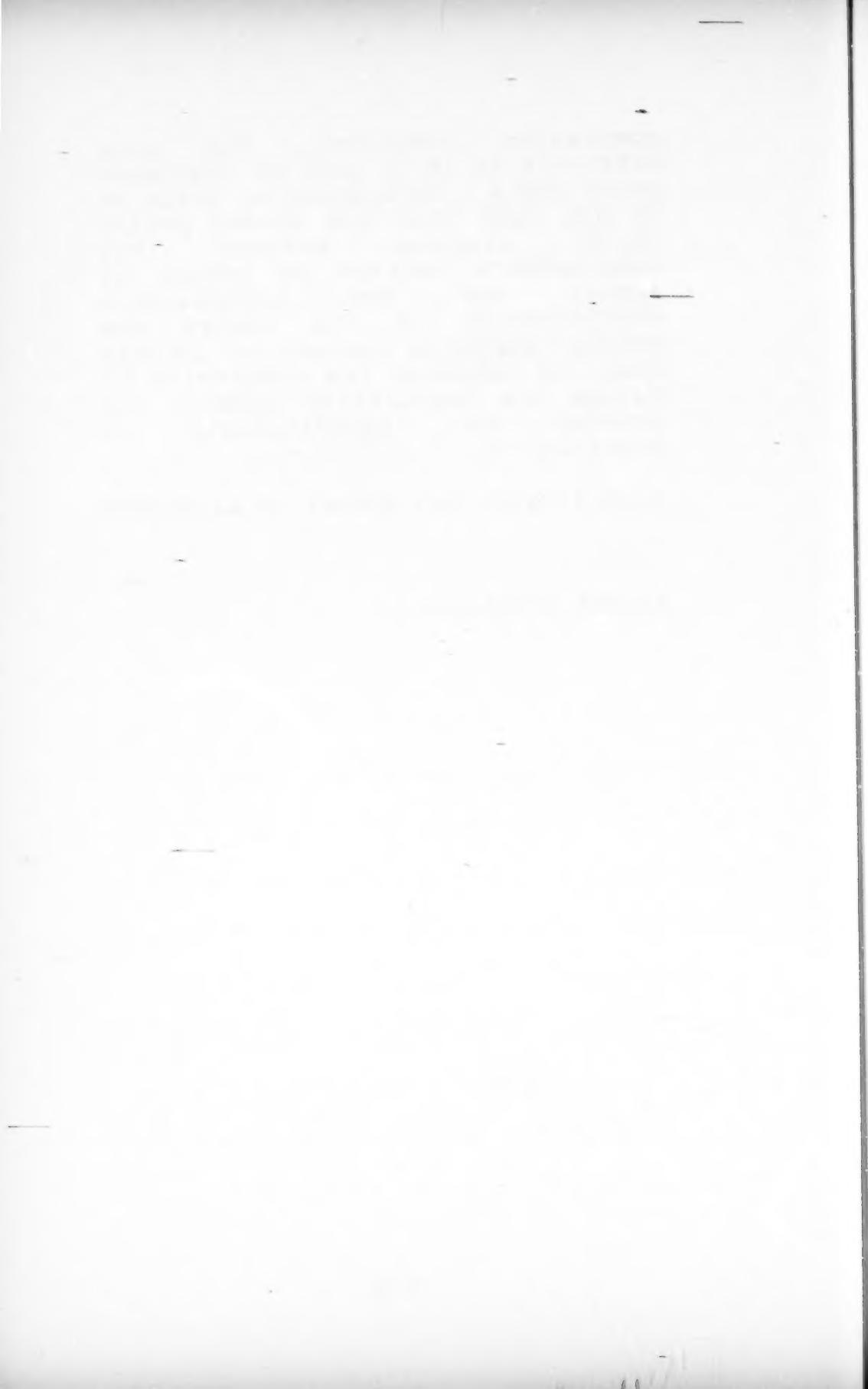
"[U]ndue delay can create serious hardships. Commission orders frequently involve awards of back pay. If the commission acts dilatorily, back pay awards can amount to large sums. Moreover, the longer the delay in resolving a



commission complaint, the more difficult it is to make an aggrieved party whole. Consequently, while we do not find that the 92-day period which elapsed between the commission's receipt of notice of appeal and the commission's certification of the record was unduly lengthy or prejudicial in this case, it behooves the commission to follow its legislative mandate and proceed as 'expeditiously as possible.'"

Accordingly, the appeal is dismissed.

Appeal dismissed.



It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CORRIGAN, J., and

PARRINO, J., CONCUR

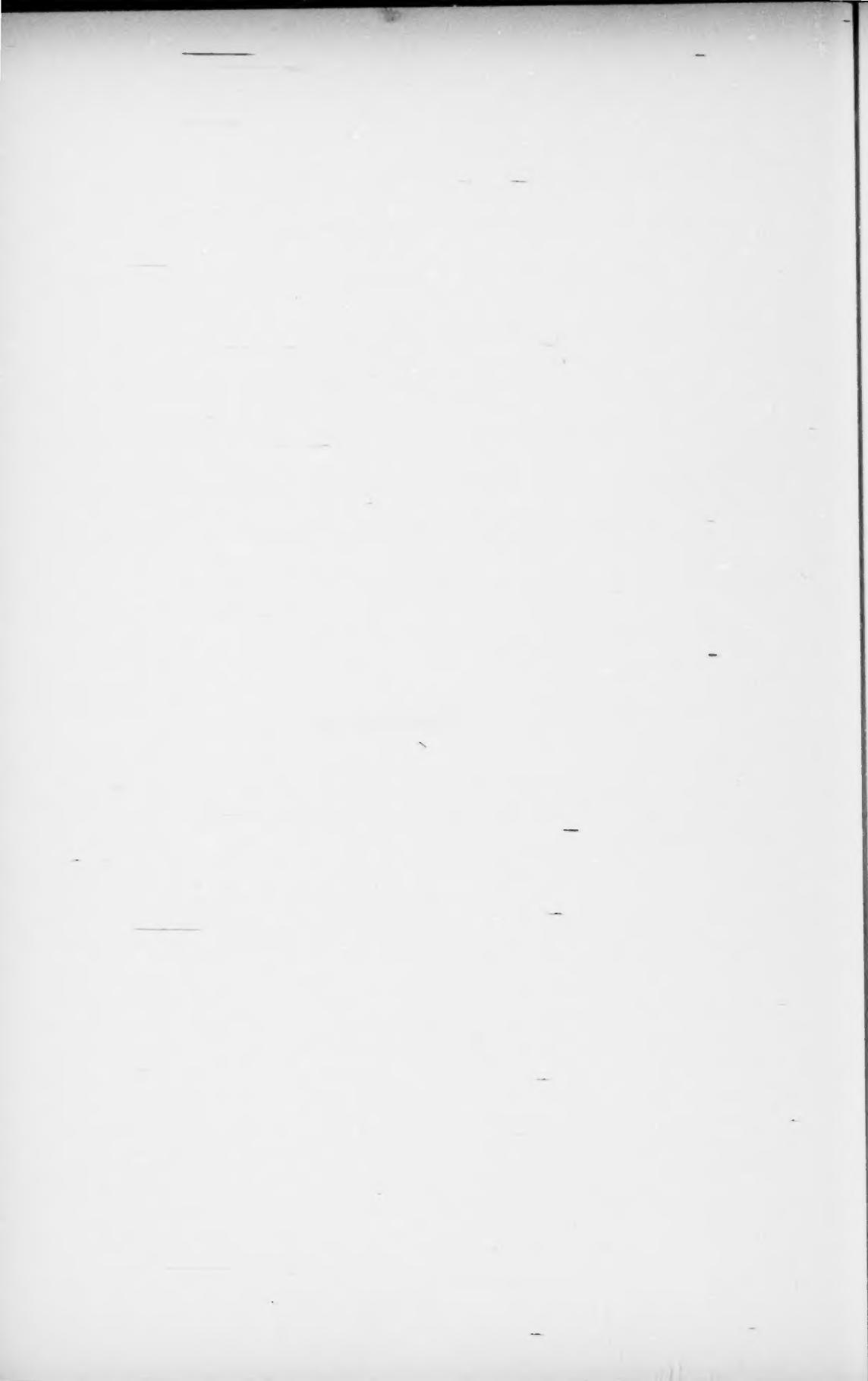
(Judge Thomas J. Parrino, retired of the Eighth District Court of Appeals, sitting by assignment).

/s/ Ann McManamon
PRESIDING JUDGE
ANN McMANAMON

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.



EXHIBIT D



THE SUPREME COURT OF OHIO

1989 TERM

To wit: February 15, 1989

City of Garfield Heights,:
Appellant, : Case No. 89-30

v. : E N T R Y

William Asad,
Appellee. :

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, \$20.00, paid by City of Garfield Heights.

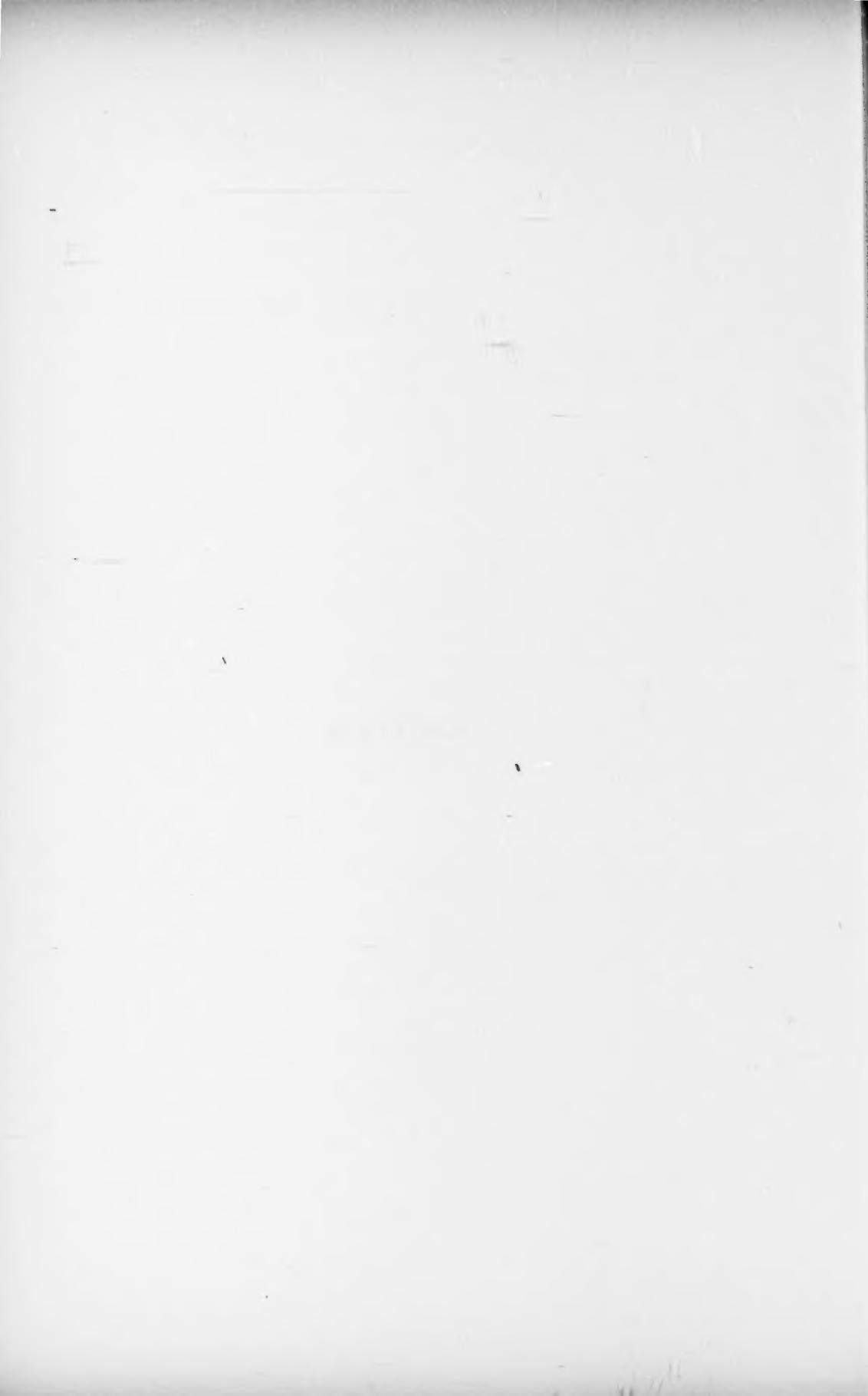
(Court of Appeals No. 54615)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

RECEIVED
FEB 17 1989
Law Department
City of Garfield Hts.



EXHIBIT E



THE SUPREME COURT OF OHIO

1989 TERM

To wit: March 22, 1989

City of Garfield Heights,: Case No. 89-30
Appellant,:

v. : REHEARING ENTRY

William Asad,: (Cuyahoga County)
Appellee.:

IT IS ORDERED by the Court that rehearing
in this case be, and the same is hereby,
denied.

(Court of Appeals No. 54615)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

RECEIVED
MAR 24 1989
Law Department
City of Garfield Hts.